

The Leaking Truth

17th Post - S. 3035 Bill Copied and Pasted Directly from Congress.gov Before Edits Made



April 07, 2024

Out of this whole document this stands out:

(d) Solicitation To State Number of Offerors To Be Selected for Phase-Two Requests for Competitive Proposals.—A solicitation issued pursuant to the procedures described in subsection (c) shall state the maximum number of offerors that are to be selected to submit competitive proposals pursuant to subsection (c)(4). The maximum number specified in the solicitation shall not exceed 5 unless the agency determines with respect to an individual solicitation that a specified number greater than 5 is in the Federal Government's interest and is consistent with the purposes and objectives of the two-phase selection process.

"(2) Deployment and pilot.—Not later than 1 year after the date of enactment of this Act, the Director, in coordination with the heads of relevant agencies and Federal entities, including the Administrator of General Services, the Bureau of Fiscal Service of the Department of the Treasury, the Council of the Inspectors General on Integrity and Efficiency, and the Pandemic Response Accountability Committee, and other officials as the Director determines to be appropriate, shall ensure the initiation of the piloting of the 4 new artificial intelligence use case applications identified under subsection (a), leveraging commercially available technologies and systems to demonstrate scalable artificial intelligence-enabled capabilities to support the use cases identified under subsection (a).

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EVIDENCE

41 USC Ch. 33: PLANNING AND SOLICITATION
From Title 41—PUBLIC CONTRACTS
Subtitle I—Federal Procurement Policy

Division C—Procurement

CHAPTER 33—PLANNING AND SOLICITATION

Sec.

3301.Full and open competition.

3302.Requirements for purchase of property and services pursuant to multiple award contracts.

3303.Exclusion of particular source or restriction of solicitation to small business concerns.

3304.Use of noncompetitive procedures.

3305.Simplified procedures for small purchases.

3306.Planning and solicitation requirements.

3307.Preference for commercial products and commercial services.

3308.Planning for future competition in contracts for major systems.

3309.Design-build selection procedures.

3310.Quantities to order.

3311.Qualification requirement.

3312.Database on price trends of items and services under Federal contracts.

Editorial Notes

Amendments

2018—Pub. L. 115–232, div. A, title VIII, §836(b)(10)(B)(ii), Aug. 13, 2018, 132 Stat. 1863, substituted "Preference for commercial products and commercial services" for "Preference for commercial items" in item 3307.

2013—Pub. L. 112–239, div. A, title VIII, §851(a)(2), Jan. 2, 2013, 126 Stat. 1855, added item 3312.

§3301. Full and open competition

(a) In General.—Except as provided in sections 3303, 3304(a), and 3305 of this title and except in the case of procurement procedures otherwise expressly authorized by statute, an executive agency in conducting a procurement for property or services shall —

(1) obtain full and open competition through the use of competitive procedures in accordance with the requirements of this division and the Federal Acquisition Regulation; and

(2) use the competitive procedure or combination of competitive procedures that is best suited under the circumstances of the procurement.

(b) Appropriate Competitive Procedures.—

(1) Use of sealed bids.—In determining the competitive procedures appropriate under the circumstance, an executive agency shall—

(A) solicit sealed bids if—

(i) time permits the solicitation, submission, and evaluation of sealed bids;

(ii) the award will be made on the basis of price and other price-related factors;

(iii) it is not necessary to conduct discussions with the responding sources about their bids; and

(iv) there is a reasonable expectation of receiving more than one sealed bid; or

(B) request competitive proposals if sealed bids are not appropriate under subparagraph (A).

(2) Sealed bid not required.—Paragraph (1)(A) does not require the use of sealed-bid procedures in cases in which section 204(e) 1 of title 23 applies.

(c) Efficient Fulfillment of Government Requirements.—The Federal Acquisition Regulation shall ensure that the requirement to obtain full and open competition is implemented in a manner that is consistent with the need to efficiently fulfill the Federal Government's requirements.

(Pub. L. 111–350, §3, Jan. 4, 2011, 124 Stat. 3745.)

Historical and Revision Notes

Revised

Section

Source (U.S. Code) Source (Statutes at Large)

3301(a) 41:253(a)(1). June 30, 1949, ch. 288, title III, §303(a), 63 Stat. 395; July 12, 1952, ch. 703, §1(m), 66 Stat. 594; Pub. L. 90–268, §2, Mar. 16, 1968, 82 Stat. 49; Pub. L. 98–369, title VII, §2711(a)(1), July 18, 1984, 98 Stat. 1175; Pub. L. 103–355, title I, §1051(1), Oct. 13, 1994, 108 Stat. 3260.

3301(b)(1) 41:253(a)(2).

3301(b)(2) 41:252(c)(2). June 30, 1949, ch. 288, title III, §302(c)(2), as added Pub. L. 98–369, title VII, §2714(a)(1)(B), July 18, 1984, 98 Stat. 1184.

3301(c) 41:253(h). June 30, 1949, ch. 288, title III, §303(h), as added Pub. L. 104–106,

title XLI, §4101(b)(2), Feb. 10, 1996, 110 Stat. 642.

Editorial Notes

References in Text

Section 204 of title 23, referred to in subsec. (b)(2), was repealed and a new section 204 enacted by Pub. L. 112–141, div. A, title I, §1119(a), July 6, 2012, 126 Stat. 473, 489.

Statutory Notes and Related Subsidiaries

Regulations

Pub. L. 113–291, div. A, title VIII, §836, Dec. 19, 2014, 128 Stat. 3449, provided that: "Not later than 180 days after the date of the enactment of this Act [Dec. 19, 2014], the Administrator for Federal Procurement Policy shall prescribe regulations providing that when the Federal Government makes a purchase of services and supplies offered under the Federal Strategic Sourcing Initiative (managed by the Office of Federal Procurement Policy) but such Initiative is not used, the contract file for the purchase shall include a brief analysis of the comparative value, including price and nonprice factors, between the services and supplies offered under such Initiative and services and supplies offered under the source or sources used for the purchase."

Construction

Pub. L. 98–369, div. B, title VII, §2711(c), July 18, 1984, 98 Stat. 1181, provided that: "The amendments made by this section [see Tables for classification] do not supersede or affect the provisions of section 8(a) of the Small Business Act (15 U.S.C. 637(a))."

Pilot Programs for Authority To Acquire Innovative Commercial Items Using General Solicitation Competitive Procedures

Pub. L. 114–328, div. A, title VIII, §880, Dec. 23, 2016, 130 Stat. 2313, as amended by Pub. L. 115–232, div. A, title VIII, §836(f)(10), Aug. 13, 2018, 132 Stat. 1872; Pub. L. 117–263, div. G, title LXXII, §7227(a), Dec. 23, 2022, 136 Stat. 3675, provided that:

"(a) Authority.—

"(1) In general.—The head of an agency may carry out a pilot program, to be known as a 'commercial solutions opening pilot program', under which innovative commercial products may be acquired through a competitive selection of proposals resulting from a general solicitation and the peer review of such proposals.

"(2) Head of an agency.—In this section, the term 'head of an agency' means the following:

"(A) The Secretary of Homeland Security.

"(B) The Administrator of General Services.

"(3) Applicability of section.—This section applies to the following agencies:

"(A) The Department of Homeland Security.

"(B) The General Services Administration.

"(b) Treatment as Competitive Procedures.—Use of general solicitation competitive procedures for the pilot program under subsection (a) shall be considered, in the case of the Department of Homeland Security and the General Services Administration, to be use of competitive procedures for purposes of division C of [subtitle I of] title 41, United States Code (as defined in section 152 of such title).

"(c) Limitation.—The head of an agency may not enter into a contract under the pilot program for an amount in excess of \$25,000,000.

"(d) Guidance.—The head of an agency shall issue guidance for the implementation of the pilot program under this section within that agency. Such guidance shall be issued in consultation with the Office of Management and Budget and shall be posted for access by the public.

"(e) Report Required.—

"(1) In general.—Not later than three years after the date of the enactment of this Act [Dec. 23, 2016], the head of an agency shall submit to the congressional committees specified in paragraph (3) a report on the activities the agency carried out under the pilot program.

"(2) Elements of report.—Each report under this subsection shall include the following:

"(A) An assessment of the impact of the pilot program on competition.

"(B) A comparison of acquisition timelines for—

"(i) procurements made using the pilot program; and

"(ii) procurements made using other competitive procedures that do not use general solicitations.

"(C) A recommendation on whether the authority for the pilot program should be made permanent.

"(3) Specified congressional committees.—The congressional committees specified in this paragraph are the Committee on Homeland Security and Governmental Affairs of the Senate and the Committee on Oversight and Government Reform [now Committee on Oversight and Reform] of the House of Representatives.

"(f) Definitions.—In this section—

"(1) the term 'commercial product'—

"(A) has the meaning given the term 'commercial item' in section 2.101 of the Federal Acquisition Regulation; and

"(B) includes a commercial product or a commercial service, as defined in sections 103 and 103a, respectively, of title 41, United States Code; and

"(2) the term 'innovative' means—

"(A) any new technology, process, or method, including research and development; or

"(B) any new application of an existing technology, process, or method.

"(g) Termination.—The authority to enter into a contract under a pilot program under this section terminates on September 30, 2027."

Governmentwide Software Purchasing Program

Pub. L. 113–291, div. A, title VIII, §837, Dec. 19, 2014, 128 Stat. 3450, provided that:

"(a) In General.—The Administrator of General Services shall identify and develop a strategic sourcing initiative to enhance Governmentwide acquisition, shared use, and dissemination of software, as well as compliance with end user license agreements.

"(b) Governmentwide User License Agreement.—The Administrator, in developing the initiative under subsection (a), shall allow for the purchase of a license agreement that is available for use by all Executive agencies (as defined in section 105 of title 5, United States Code) as one user to the maximum extent practicable and as appropriate."

1 See References in Text note below.

§3302. Requirements for purchase of property and services pursuant to multiple award contracts

(a) Definitions.—In this section:

(1) Executive agency.— The term "executive agency" has the same meaning given in section 133 of this title.

(2) Individual purchase.—The term "individual purchase" means a task order, delivery order, or other purchase.

(3) Multiple award contract.—The term "multiple award contract" means—

(A) a contract that is entered into by the Administrator of General Services under the multiple award schedule program referred to in section 3012(3) of title 10;

(B) a multiple award task order contract that is entered into under the authority of chapter 245 of title 10 or chapter 41 of this title; and

(C) any other indefinite delivery, indefinite quantity contract that is entered into by the head of an executive agency with 2 or more sources pursuant to the same solicitation.

(4) Sole source task or delivery order.—The term "sole source task or delivery order" means any order that does not follow the competitive procedures in paragraph (2) or (3) of subsection (c).

(b) Regulations Required.—The Federal Acquisition Regulation shall require enhanced competition in the purchase of property and services by all executive agencies pursuant to multiple award contracts.

(c) Content of Regulations.—

(1) In general.—The regulations required by subsection (b) shall provide that each individual purchase of property or services in excess of the simplified acquisition threshold that is made under a multiple award contract shall be made on a competitive basis unless a contracting officer—

(A) waives the requirement on the basis of a determination that—

(i) one of the circumstances described in paragraphs (1) to (4) of section 4106(c) of this title or section 3406(c) of title 10 applies to the individual purchase; or

(ii) a law expressly authorizes or requires that the purchase be made from a specified source; and

(B) justifies the determination in writing.

(2) Competitive basis procedures.—For purposes of this subsection, an individual purchase of property or services is made on a competitive basis only if it is made pursuant to procedures that—

(A) require fair notice of the intent to make that purchase (including a description of the work to be performed and the basis on which the selection will be made) to be provided to all contractors offering the property or services under the multiple award contract; and

(B) afford all contractors responding to the notice a fair opportunity to make an offer and have that offer fairly considered by the official making the purchase.

(3) Exception to notice requirement.—

(A) In general.—Notwithstanding paragraph (2), and subject to subparagraph (B), notice may be provided to fewer than all contractors offering the property or services under a multiple award contract as described in subsection (a)(3)(A) if notice is provided to as many contractors as practicable.

(B) Limitation on exception.—A purchase may not be made pursuant to a notice that is provided to fewer than all contractors under subparagraph (A) unless—

(i) offers were received from at least 3 qualified contractors; or

(ii) a contracting officer of the executive agency determines in writing that no additional qualified contractors were able to be identified despite reasonable efforts to do so.

(d) Public Notice Requirements Related to Sole Source Task or Delivery Orders.—

(1) Public notice required.—The Federal Acquisition Regulation shall require the head of each executive agency to—

(A) publish on FedBizOpps notice of all sole source task or delivery orders in excess of the simplified acquisition threshold that are placed against multiple award contracts not later than 14 days after the orders are placed, except in the event of extraordinary

circumstances or classified orders; and

(B) disclose the determination required by subsection (c)(1) related to sole source task or delivery orders in excess of the simplified acquisition threshold placed against multiple award contracts through the same mechanism and to the same extent as the disclosure of documents containing a justification and approval required by section 3204(e)(1) of title 10 and section 3304(e)(1) of this title, except in the event of extraordinary circumstances or classified orders.

(2) Exemption.—This subsection does not require the public availability of information that is exempt from public disclosure under section 552(b) of title 5.

(e) Applicability.—The regulations required by subsection (b) shall apply to all individual purchases of property or services that are made under multiple award contracts on or after the effective date of the regulations, without regard to whether the multiple award contracts were entered into before, on, or after the effective date.

(f) Commercial Leasing Services.—The regulations required by subsection (b) shall not apply to individual purchases for commercial leasing services that are made on a no cost basis and made under a multiple award contract awarded in accordance with the requirements for full and open competition.

(Pub. L. 111–350, §3, Jan. 4, 2011, 124 Stat. 3746; Pub. L. 111–383, div. A, title X, §1075(e)(14), Jan. 7, 2011, 124 Stat. 4375; Pub. L. 116–92, div. A, title VIII, §893(b), Dec. 20, 2019, 133 Stat. 1540; Pub. L. 117–81, div. A, title XVII, §1702(h)(12), Dec. 27, 2021, 135 Stat. 2158.)

Amendment Not Shown in Text

This section was derived from Pub. L. 110–417, [div. A], title VIII, §863(a)–(e), Oct. 14, 2008, 122 Stat. 4547, which was set out as a note under section 253h of former Title 41, Public Contracts, prior to being repealed and reenacted by Pub. L. 111–350, §3, 7(b), Jan. 4, 2011, 124 Stat. 3677, 3855. Section 863(b)(3)(A) of Pub. L. 110–417 was restated as subsec. (c)(3)(A) of this section and subsequently amended by Pub. L. 111–383, div. A, title X, §1075(e)(14), Jan. 7, 2011, 124 Stat. 4375. For applicability of that amendment to this section, see section 6(a) of Pub. L. 111–350, set out as a Transitional and Savings Provisions note preceding section 101 of this title. Section 863(b)(3)(A) of Pub. L. 110–417 was amended by striking "subsection (d)(2)(A)" and inserting "subsection (d)(3)(A)". Such reference did not appear in the text of subsec. (c)(3)(A) as enacted. See Historical and Revision Notes below.

Repeal of Subsection (f)

Pub. L. 116–92, div. A, title VIII, §893(b)(2), Dec. 20, 2019, 133 Stat. 1540 provided that,

effective Dec. 31, 2025, subsection (f) of this section is repealed. See 2019 Amendment note below.

Historical and Revision Notes

Revised

Section

Source (U.S. Code) Source (Statutes at Large)

3302 41:253h note. Pub. L. 110–417, [div. A], title VIII, §863(a)–(e), Oct. 14, 2008, 122 Stat. 4547.

In subsection (b), the words "Not later than one year after the date of the enactment of this Act" are omitted because of section 6(f) of the bill. The words "shall require" are substituted for "shall be amended to require" to reflect the permanence of the provision.

In subsection (c)(2)(A), the words "except as provided in paragraph (3)" are omitted as unnecessary.

In subsection (c)(3)(A), "subsection (a)(3)(A)" is substituted for "subsection (d)(2)(A)" for consistency in the revised title and to correct an error in the law.

In subsection (d)(1), the words "Not later than one year after the date of the enactment of this Act" are omitted because of section 6(f) of the bill. The words "shall require" are substituted for "shall be amended to require" to reflect the permanence of the provision.

Editorial Notes

Amendments

2021—Subsec. (a)(3). Pub. L. 117–81, §1702(h)(12)(A), substituted "section 3012(3)" for "section 2302(2)(C)" in subpar. (A) and "chapter 245 of title 10" for "sections 2304a to 2304d of title 10," in subpar. (B).

Subsec. (c)(1)(A)(i). Pub. L. 117–81, §1702(h)(12)(B), substituted "section 3406(c)" for "section 2304c(b)".

Subsec. (d)(1)(B). Pub. L. 117–81, §1702(h)(12)(C), substituted "section 3204(e)(1)" for "section 2304(f)(1)".

2019—Subsec. (f). Pub. L. 116–92, §893(b)(2), struck out subsec. (f). Text read as follows: "The regulations required by subsection (b) shall not apply to individual purchases for commercial leasing services that are made on a no cost basis and made under a multiple award contract awarded in accordance with the requirements for full and open competition."

Pub. L. 116–92, §893(b)(1), added subsec. (f).

Statutory Notes and Related Subsidiaries

Effective Date of 2019 Amendment

Pub. L. 116–92, div. A, title VIII, §893(b)(2), Dec. 20, 2019, 133 Stat. 1540, provided that the amendment made by section 893(b)(2) is effective Dec. 31, 2025.

Individual Acquisition for Commercial Leasing Services

Pub. L. 115–232, div. A, title VIII, §877, Aug. 13, 2018, 132 Stat. 1907, which related to individual acquisition for commercial leasing services not construed as purchase of property or services under certain conditions, was repealed by Pub. L. 116–92, div. A, title VIII, §893(a), Dec. 20, 2019, 133 Stat. 1540.

§3303. Exclusion of particular source or restriction of solicitation to small business concerns

(a) Exclusion of Particular Source.—

(1) Criteria for exclusion.—An executive agency may provide for the procurement of property or services covered by section 3301 of this title using competitive procedures but excluding a particular source to establish or maintain an alternative source of supply for that property or service if the agency head determines that to do so would—

(A) increase or maintain competition and likely result in reduced overall cost for the procurement, or for an anticipated procurement, of the property or services;

(B) be in the interest of national defense in having a facility (or a producer, manufacturer, or other supplier) available for furnishing the property or service in case of a national emergency or industrial mobilization;

(C) be in the interest of national defense in establishing or maintaining an essential engineering, research, or development capability to be provided by an educational or other nonprofit institution or a Federally funded research and development center;

(D) ensure the continuous availability of a reliable source of supply of the property or service;

(E) satisfy projected needs for the property or service determined on the basis of a history of high demand for the property or service; or

(F) satisfy a critical need for medical, safety, or emergency supplies.

(2) Determination for class disallowed.—A determination under paragraph (1) may not be made for a class of purchases or contracts.

(b) Exclusion of Other Than Small Business Concerns.—An executive agency may provide for the procurement of property or services covered by section 3301 of this title using competitive procedures, but excluding other than small business concerns in furtherance of sections 9 and 15 of the Small Business Act (15 U.S.C. 638, 644).

(c) Nonapplication of Justification and Approval Requirements.—A contract awarded pursuant to the competitive procedures referred to in subsections (a) and (b) is not subject to the justification and approval required by section 3304(e)(1) of this title.

(Pub. L. 111–350, §3, Jan. 4, 2011, 124 Stat. 3747.)

Historical and Revision Notes

Revised

Section

Source (U.S. Code) Source (Statutes at Large)

3303 41:253(b). June 30, 1949, ch. 288, title III, §303(b), 63 Stat. 395; July 12, 1952, ch. 703, §1(m), 66 Stat. 594; Pub. L. 90–268, §2, Mar. 16, 1968, 82 Stat. 49; Pub. L. 98–369, title VII, §2711(a)(1), July 18, 1984, 98 Stat. 1175; Pub. L. 98–577, title V, §504(a)(1), Oct. 30, 1984, 98 Stat. 3086; Pub. L. 103–355, title I, §1052, Oct. 13, 1994, 108 Stat. 3260.

§3304. Use of noncompetitive procedures

(a) When Noncompetitive Procedures May Be Used.—An executive agency may use procedures other than competitive procedures only when—

(1) the property or services needed by the executive agency are available from only one responsible source and no other type of property or services will satisfy the needs of the executive agency;

(2) the executive agency's need for the property or services is of such an unusual and compelling urgency that the Federal Government would be seriously injured unless the executive agency is permitted to limit the number of sources from which it solicits bids or proposals;

(3) it is necessary to award the contract to a particular source—

(A) to maintain a facility, producer, manufacturer, or other supplier available for furnishing property or services in case of a national emergency or to achieve industrial mobilization;

(B) to establish or maintain an essential engineering, research, or development capability to be provided by an educational or other nonprofit institution or a Federally funded research and development center;

(C) to procure the services of an expert for use, in any litigation or dispute (including any reasonably foreseeable litigation or dispute) involving the Federal Government, in any trial, hearing, or proceeding before a court, administrative tribunal, or agency, whether or not the expert is expected to testify; or

(D) to procure the services of an expert or neutral for use in any part of an alternative dispute resolution or negotiated rulemaking process, whether or not the expert is expected to testify;

(4) the terms of an international agreement or treaty between the Federal Government and a foreign government or an international organization, or the written directions of a foreign government reimbursing the executive agency for the cost of the procurement of the property or services for that government, have the effect of requiring the use of procedures other than competitive procedures;

(5) subject to section 3105 of this title, a statute expressly authorizes or requires that the procurement be made through another executive agency or from a specified source, or the agency's need is for a brand-name commercial product for authorized resale;

(6) the disclosure of the executive agency's needs would compromise the national security unless the agency is permitted to limit the number of sources from which it solicits bids or proposals; or

(7) the head of the executive agency (who may not delegate the authority under this paragraph)—

(A) determines that it is necessary in the public interest to use procedures other than competitive procedures in the particular procurement concerned; and

(B) notifies Congress in writing of that determination not less than 30 days before the award of the contract.

(b) Property or Services Deemed Available From Only One Source.—For the purposes of subsection (a)(1), in the case of—

(1) a contract for property or services to be awarded on the basis of acceptance of an

unsolicited research proposal, the property or services are deemed to be available from only one source if the source has submitted an unsolicited research proposal that demonstrates a unique and innovative concept, the substance of which is not otherwise available to the Federal Government and does not resemble the substance of a pending competitive procurement; or

(2) a follow-on contract for the continued development or production of a major system or highly specialized equipment, the property may be deemed to be available only from the original source and may be procured through procedures other than competitive procedures when it is likely that award to a source other than the original source would result in—

(A) substantial duplication of cost to the Federal Government that is not expected to be recovered through competition; or

(B) unacceptable delay in fulfilling the executive agency's needs.

(c) Property or Services Needed With Unusual and Compelling Urgency.—

(1) Allowable contract period.—The contract period of a contract described in paragraph (2) that is entered into by an executive agency pursuant to the authority provided under subsection (a)(2)—

(A) may not exceed the time necessary—

(i) to meet the unusual and compelling requirements of the work to be performed under the contract; and

(ii) for the executive agency to enter into another contract for the required goods or services through the use of competitive procedures; and

(B) may not exceed one year unless the head of the executive agency entering into the contract determines that exceptional circumstances apply.

(2) Applicability of allowable contract period.—This subsection applies to any contract in an amount greater than the simplified acquisition threshold.

(d) Offer Requests to Potential Sources.—An executive agency using procedures other

than competitive procedures to procure property or services by reason of the application of paragraph (2) or (6) of subsection (a) shall request offers from as many potential sources as is practicable under the circumstances.

(e) Justification for Use of Noncompetitive Procedures.—

(1) Prerequisites for awarding contract.—Except as provided in paragraphs (3) and (4), an executive agency may not award a contract using procedures other than competitive procedures unless—

(A) the contracting officer for the contract justifies the use of those procedures in writing and certifies the accuracy and completeness of the justification;

(B) the justification is approved, in the case of a contract for an amount—

(i) exceeding \$500,000 but equal to or less than \$10,000,000, by the advocate for competition for the procuring activity (without further delegation) or by an official referred to in clause (ii) or (iii);

(ii) exceeding \$10,000,000 but equal to or less than \$50,000,000, by the head of the procuring activity or by a delegate who, if a member of the armed forces, is a general or flag officer or, if a civilian, is serving in a position in which the individual is entitled to receive the daily equivalent of the maximum annual rate of basic pay payable for level IV of the Executive Schedule (or in a comparable or higher position under another schedule); or

(iii) exceeding \$50,000,000, by the senior procurement executive of the agency designated pursuant to section 1702(c) of this title (without further delegation); and

(C) any required notice has been published with respect to the contract pursuant to section 1708 of this title and the executive agency has considered all bids or proposals received in response to that notice.

(2) Elements of justification.—The justification required by paragraph (1)(A) shall include —

(A) a description of the agency's needs;

(B) an identification of the statutory exception from the requirement to use competitive procedures and a demonstration, based on the proposed contractor's qualifications or the nature of the procurement, of the reasons for using that exception;

- (C) a determination that the anticipated cost will be fair and reasonable;
- (D) a description of the market survey conducted or a statement of the reasons a market survey was not conducted;
- (E) a listing of any sources that expressed in writing an interest in the procurement; and
- (F) a statement of any actions the agency may take to remove or overcome a barrier to competition before a subsequent procurement for those needs.

(3) Justification allowed after contract awarded.—In the case of a procurement permitted by subsection (a)(2), the justification and approval required by paragraph (1) may be made after the contract is awarded.

(4) Justification not required.—The justification and approval required by paragraph (1) are not required if—

- (A) a statute expressly requires that the procurement be made from a specified source;
- (B) the agency's need is for a brand-name commercial product for authorized resale;
- (C) the procurement is permitted by subsection (a)(7); or
- (D) the procurement is conducted under chapter 85 of this title or section 8(a) of the Small Business Act (15 U.S.C. 637(a)).

(5) Restrictions on executive agencies.—

(A) Contracts and procurement of property or services.—In no case may an executive agency—

- (i) enter into a contract for property or services using procedures other than competitive procedures on the basis of the lack of advance planning or concerns related to the amount available to the agency for procurement functions; or
- (ii) procure property or services from another executive agency unless the other executive agency complies fully with the requirements of this division in its procurement of the property or services.

(B) Additional restriction.—The restriction set out in subparagraph (A)(ii) is in addition to any other restriction provided by law.

(f) Public Availability of Justification and Approval Required for Using Noncompetitive Procedures.—

(1) Time requirement.—

(A) Within 14 days after contract award.—Except as provided in subparagraph (B), in the case of a procurement permitted by subsection (a), the head of an executive agency shall make publicly available, within 14 days after the award of the contract, the documents containing the justification and approval required by subsection (e)(1) with respect to the procurement.

(B) Within 30 days after contract award.—In the case of a procurement permitted by subsection (a)(2), subparagraph (A) shall be applied by substituting "30 days" for "14 days".

(2) Availability on websites.—The documents referred to in subparagraph (A) of paragraph (1) shall be made available on the website of the agency and through a Government-wide website selected by the Administrator.

(3) Exception to availability and approval requirement.—This subsection does not require the public availability of information that is exempt from public disclosure under section 552(b) of title 5.

(Pub. L. 111–350, §3, Jan. 4, 2011, 124 Stat. 3748; Pub. L. 115–232, div. A, title VIII, §836(b)(7), Aug. 13, 2018, 132 Stat. 1861.)

Historical and Revision Notes

Revised
Section

Source (U.S. Code) Source (Statutes at Large)

3304(a) 41:253(c), (d)(2). June 30, 1949, ch. 288, title III, §303(c)–(f), (j), 63 Stat. 395; July 12, 1952, ch. 703, §1(m), 66 Stat. 594; Pub. L. 90–268, §2, Mar. 16, 1968, 82 Stat. 49; Pub. L. 98–369, title VII, §2711(a)(1), July 18, 1984, 98 Stat. 1176; Pub. L. 98–577, title V, §504(a)(2), Oct. 30, 1984, 98 Stat. 3086; Pub. L. 99–145, title IX, §961(a)(2), title XIII, §1304(c)(2), Nov. 8, 1985, 99 Stat. 703, 742; Pub. L. 103–355, title I, §§1053, 1055(a), title VII, §7203(b)(1)(A), Oct. 13, 1994, 108 Stat. 3261, 3265, 3380; Pub. L. 104–

106, title XLI, §4102(b), title XLIII, §4321(e)(2), Feb. 10, 1996, 110 Stat. 643, 674; Pub. L. 104–320, §§7(a)(2), 11(c)(2), Oct. 19, 1996, 110 Stat. 3871, 3873; Pub. L. 110–181, div. A, title VIII, §844(a), Jan. 28, 2008, 122 Stat. 239; Pub. L. 110–417, [div. A], title VIII, §862(a), Oct. 14, 2008, 122 Stat. 4546.

3304(b) 41:253(d)(1).

3304(c) 41:253(d)(3).

3304(d) 41:253(e).

3304(e)(1) 41:253(f)(1).

3304(e)(2) 41:253(f)(3).

3304(e)(3), (4) 41:253(f)(2).

3304(e)(5) 41:253(f)(4).

3304(f) 41:253(j).

In subsection (a)(7), the words "(who may not delegate the authority under this paragraph)" are substituted for 41:253(d)(2) to move the restriction closer to where it applies.

In subsection (e)(1)(B)(i), the words "advocate for competition" are substituted for "competition advocate" for consistency with section 1705 of the revised title.

In subsection (e)(1)(B)(ii), the reference to section 5376 of title 5 is substituted for the reference to grade GS–16 or above under the General Schedule because of section 529 [title I, §101(c)(1)] of the Treasury, Postal Service and General Government Appropriations Act, 1991 (Public Law 101–509, 104 Stat. 1442, 5 U.S.C. 5376 note).

In subsection (e)(5)(B), the words "and not in lieu of" are omitted as unnecessary.

In subsection (f)(2), the words "referred to in subparagraph (A) of paragraph (1)" are added for clarity.

Senate Revision Amendment

In subsec. (e)(1)(B)(ii), "for level IV of the Executive Schedule" substituted for "under section 5376 of title 5" by S. Amdt. 4726 (111th Cong.). See 156 Cong. Rec. 18682 (2010).

Editorial Notes

Amendments

2018—Subsecs. (a)(5), (e)(4)(B). Pub. L. 115–232 substituted "commercial product" for "commercial item".

Statutory Notes and Related Subsidiaries

Effective Date of 2018 Amendment

Amendment by Pub. L. 115–232 effective Jan. 1, 2020, subject to a savings provision,

see section 836(h) of Pub. L. 115–232, set out as an Effective Date of 2018 Amendment; Savings Provision note under section 453b of Title 6, Domestic Security.

General Services Administration: Notification of Use of Noncompetitive Procedures in Response to Public Health Emergency Declaration

Pub. L. 116–136, div. B, title V, §15003, Mar. 27, 2020, 134 Stat. 532, provided that:

"Notwithstanding 41 U.S.C. 3304(a)(7)(B), the Administrator, when making a determination that use of noncompetitive procedures is necessary for public interest in accordance with 41 U.S.C. 3304(a)(7)(A) in response to a public health emergency declaration by the Secretary of Health and Human Services under section 319 of the Public Health Service Act (42 U.S.C. 247(d) [247d]), is required to notify Congress in writing of that determination not less than 3 days prior to the award of the contract."

Justification and Approval of Sole-Source Contracts

Pub. L. 111–84, div. A, title VIII, §811, Oct. 28, 2009, 123 Stat. 2405, as amended by Pub. L. 117–81, div. A, title XVII, §1702(i)(3), Dec. 27, 2021, 135 Stat. 2159, provided that:

"(a) In General.—Not later than 180 days after the date of the enactment of this Act [Oct. 28, 2009], the Federal Acquisition Regulation shall be revised to provide that the head of an agency may not award a sole-source contract in a covered procurement for an amount exceeding \$20,000,000 unless—

"(1) the contracting officer for the contract justifies the use of a sole-source contract in writing;

"(2) the justification is approved by the appropriate official designated to approve contract awards for dollar amounts that are comparable to the amount of the sole-source contract; and

"(3) the justification and related information are made public as provided in sections 3204(e)(1)(C) and 3204(f) of title 10, United States Code, or sections 303(f)(1)(C) and 303(j) of the Federal Property and Administrative Services Act of 1949 (41 U.S.C. 253(f)(1)(C) and 253(j)) [now 41 U.S.C. 3304(e)(1)(C) and 3304(f)], as applicable.

"(b) Elements of Justification.—The justification of a sole-source contract required pursuant to subsection (a) shall include the following:

"(1) A description of the needs of the agency concerned for the matters covered by the contract.

"(2) A specification of the statutory provision providing the exception from the requirement to use competitive procedures in entering into the contract.

"(3) A determination that the use of a sole-source contract is in the best interest of the agency concerned.

"(4) A determination that the anticipated cost of the contract will be fair and reasonable.

"(5) Such other matters as the head of the agency concerned shall specify for purposes of this section.

"(c) Definitions.—In this section:

"(1) Covered procurement.—The term 'covered procurement' means either of the following:

"(A) A procurement described in section 3204(e)(4)(D)(ii) of title 10, United States Code.

"(B) A procurement described in section 303(f)(2)(D)(ii) of the Federal Property and Administrative Services Act of 1949 ([former] 41 U.S.C. 253(f)(2)(D)(ii)) [see 41 U.S.C. 3304(e)(4)(D)].

"(2) Head of an agency.—The term 'head of an agency'—

"(A) in the case of a covered procurement as defined in paragraph (1)(A), has the meaning provided in section 3004 of title 10, United States Code; and

"(B) in the case of a covered procurement as defined in paragraph (1)(B), has the meaning provided the term 'agency head' in section 309(a) of the Federal Property and Administrative Services Act of 1949 (41 U.S.C. 259(a)) [now 41 U.S.C. 151].

"(3) Appropriate official.—The term 'appropriate official' means—

"(A) in the case of a covered procurement as defined in paragraph (1)(A), an official designated in section 3204(e)(1)(B) of title 10, United States Code; and

"(B) in the case of a covered procurement as defined in paragraph (1)(B), an official designated in section 303(f)(1)(B) of the Federal Property and Administrative Services Act of 1949 (41 U.S.C. 253(f)(1)(B)) [now 41 U.S.C. 3304(e)(1)(B)]."

§3305. Simplified procedures for small purchases

(a) Authorization.—To promote efficiency and economy in contracting and to avoid unnecessary burdens for agencies and contractors, the Federal Acquisition Regulation shall provide for special simplified procedures for purchases of property and services for amounts—

(1) not greater than the simplified acquisition threshold; and

(2) greater than the simplified acquisition threshold but not greater than \$5,000,000 for which the contracting officer reasonably expects, based on the nature of the property or services sought and on market research, that offers will include only commercial products or commercial services.

(b) Leasehold Interests in Real Property.—The Administrator of General Services shall prescribe regulations that provide special simplified procedures for acquisitions of leasehold interests in real property at rental rates that do not exceed the simplified acquisition threshold. The rental rate under a multiyear lease does not exceed the simplified acquisition threshold if the average annual amount of the rent payable for the period of the lease does not exceed the simplified acquisition threshold.

(c) Prohibition on Dividing Contracts.—A proposed purchase or contract for an amount above the simplified acquisition threshold may not be divided into several purchases or contracts for lesser amounts to use the simplified procedures required by subsection (a).

(d) Promotion of Competition.—In using the simplified procedures, an executive agency shall promote competition to the maximum extent practicable.

(e) Compliance With Special Requirements of Federal Acquisition Regulation.—An executive agency shall comply with the Federal Acquisition Regulation provisions referred to in section 1901(e) of this title.

(Pub. L. 111–350, §3, Jan. 4, 2011, 124 Stat. 3752; Pub. L. 115–232, div. A, title VIII, §836(b)(8), Aug. 13, 2018, 132 Stat. 1861.)

Historical and Revision Notes

Revised

Section

Source (U.S. Code) Source (Statutes at Large)

3305 41:253(g). June 30, 1949, ch. 288, title III, §303(g), 63 Stat. 395; July 12, 1952, ch. 703, §1(m), 66 Stat. 594; Pub. L. 90–268, §2, Mar. 16, 1968, 82 Stat. 49; Pub. L. 98–369, title VII, §2711(a)(1), July 18, 1984, 98 Stat. 1178; Pub. L. 99–145, title XIII, §1304(c)(3), Nov. 8, 1985, 99 Stat. 742; Pub. L. 101–510, title VIII, §806(c), Nov. 5, 1990, 104 Stat. 1592; Pub. L. 103–355, title I, §1051(2), title IV, §4402(a), Oct. 13, 1994, 108 Stat. 3260, 3348; Pub. L. 104–106, title XLII, §4202(b)(1), Feb. 10, 1996, 110 Stat. 653; Pub. L. 105–85, title VIII, §850(f)(4)(B), Nov. 18, 1997, 111 Stat. 1850.

Editorial Notes

Amendments

2018—Subsec. (a)(2). Pub. L. 115–232 substituted "commercial products or commercial services" for "commercial items".

Statutory Notes and Related Subsidiaries

Effective Date of 2018 Amendment

Amendment by Pub. L. 115–232 effective Jan. 1, 2020, subject to a savings provision, see section 836(h) of Pub. L. 115–232, set out as an Effective Date of 2018 Amendment; Savings Provision note under section 453b of Title 6, Domestic Security.

§3306. Planning and solicitation requirements

(a) Planning and Specifications.—

(1) Preparing for procurement.—In preparing for the procurement of property or services, an executive agency shall—

(A) specify its needs and solicit bids or proposals in a manner designed to achieve full and open competition for the procurement;

(B) use advance procurement planning and market research; and

(C) develop specifications in the manner necessary to obtain full and open competition with due regard to the nature of the property or services to be acquired.

(2) Requirements of specifications.—Each solicitation under this division shall include specifications that—

(A) consistent with this division, permit full and open competition; and

(B) include restrictive provisions or conditions only to the extent necessary to satisfy the needs of the executive agency or as authorized by law.

(3) Types of specifications.—For the purposes of paragraphs (1) and (2), the type of specification included in a solicitation shall depend on the nature of the needs of the executive agency and the market available to satisfy those needs. Subject to those needs, specifications may be stated in terms of—

(A) function, so that a variety of products or services may qualify;

(B) performance, including specifications of the range of acceptable characteristics or of the minimum acceptable standards; or

(C) design requirements.

(b) Contents of Solicitation.—In addition to the specifications described in subsection (a), each solicitation for sealed bids or competitive proposals (other than for a procurement for commercial products or commercial services using special simplified procedures or a purchase for an amount not greater than the simplified acquisition threshold) shall at a minimum include—

(1) a statement of—

(A) all significant factors and significant subfactors that the executive agency reasonably expects to consider in evaluating sealed bids (including price) or competitive proposals (including cost or price, cost-related or price-related factors and subfactors, and noncost-related or nonprice-related factors and subfactors); and

(B) the relative importance assigned to each of those factors and subfactors; and

(2)(A) in the case of sealed bids—

(i) a statement that sealed bids will be evaluated without discussions with the bidders; and

(ii) the time and place for the opening of the sealed bids; or

(B) in the case of competitive proposals—

(i) either a statement that the proposals are intended to be evaluated with, and the award made after, discussions with the offerors, or a statement that the proposals are intended to be evaluated, and the award made, without discussions with the offerors (other than discussions conducted for the purpose of minor clarification) unless discussions are determined to be necessary; and

(ii) the time and place for submission of proposals.

(c) Evaluation Factors.—

(1) In general.—In prescribing the evaluation factors to be included in each solicitation for competitive proposals, an executive agency shall—

(A) establish clearly the relative importance assigned to the evaluation factors and subfactors, including the quality of the product or services to be provided (including technical capability, management capability, prior experience, and past performance of the offeror);

(B) except as provided in paragraph (3), include cost or price to the Federal Government as an evaluation factor that must be considered in the evaluation of proposals; and

(C) except as provided in paragraph (3), disclose to offerors whether all evaluation factors other than cost or price, when combined, are—

(i) significantly more important than cost or price;

(ii) approximately equal in importance to cost or price; or

(iii) significantly less important than cost or price.

(2) Restriction on implementing regulations.—Regulations implementing paragraph (1) (C) may not define the terms "significantly more important" and "significantly less important" as specific numeric weights that would be applied uniformly to all solicitations or a class of solicitations.

(3) Exceptions for certain indefinite delivery, indefinite quantity multiple-award contracts and certain federal supply schedule contracts for services acquired on an hourly rate.—If an executive agency issues a solicitation for one or more contracts for services to be acquired on an hourly rate basis under the authority of sections 4103 and 4106 of this title or section 152(3) of this title and section 501(b) of title 40 and the executive agency intends to make a contract award to each qualifying offeror and the contract or contracts will feature individually competed task or delivery orders based on hourly rates—

(A) the contracting officer need not consider price as an evaluation factor for contract award; and

(B) if, pursuant to subparagraph (A), price is not considered as an evaluation factor for contract award, cost or price to the Federal Government shall be considered in conjunction with the issuance pursuant to sections 4106(c) and 152(3) of this title of

any task or delivery order under any contract resulting from the solicitation.

(4) Definition.—In paragraph (3), the term "qualifying offeror" means an offeror that—

(A) is determined to be a responsible source;

(B) submits a proposal that conforms to the requirements of the solicitation;

(C) meets all technical requirements; and

(D) is otherwise eligible for award.

(d) Additional Information in Solicitation.—This section does not prohibit an executive agency from—

(1) providing additional information in a solicitation, including numeric weights for all evaluation factors and subfactors on a case-by-case basis; or

(2) stating in a solicitation that award will be made to the offeror that meets the solicitation's mandatory requirements at the lowest cost or price.

(e) Limitation on Evaluation of Purchase Options.—An executive agency, in issuing a solicitation for a contract to be awarded using sealed bid procedures, may not include in the solicitation a clause providing for the evaluation of prices for options to purchase additional property or services under the contract unless the executive agency has determined that there is a reasonable likelihood that the options will be exercised.

(f) Authorization of Telecommuting for Federal Contractors.—

(1) Definition.—In this subsection, the term "executive agency" has the meaning given that term in section 133 of this title.

(2) Federal acquisition regulation to allow telecommuting.—The Federal Acquisition Regulation issued in accordance with sections 1121(b) and 1303(a)(1) of this title shall permit telecommuting by employees of Federal Government contractors in the performance of contracts entered into with executive agencies.

(3) Scope of allowance.—The Federal Acquisition Regulation at a minimum shall provide that a solicitation for the acquisition of property or services may not set forth any

requirement or evaluation criteria that would—

(A) render an offeror ineligible to enter into a contract on the basis of the inclusion of a plan of the offeror to allow the offeror's employees to telecommute, unless the contracting officer concerned first determines that the requirements of the agency, including security requirements, cannot be met if telecommuting is allowed and documents in writing the basis for the determination; or

(B) reduce the scoring of an offer on the basis of the inclusion in the offer of a plan of the offeror to allow the offeror's employees to telecommute, unless the contracting officer concerned first determines that the requirements of the agency, including security requirements, would be adversely impacted if telecommuting is allowed and documents in writing the basis for the determination.

(Pub. L. 111–350, §3, Jan. 4, 2011, 124 Stat. 3752; Pub. L. 115–232, div. A, title VIII, §§836(b)(9), 876, Aug. 13, 2018, 132 Stat. 1861, 1907.)

Historical and Revision Notes

Revised Section

Source (U.S. Code) Source (Statutes at Large)

3306(a)–(e) 41:253a. June 30, 1949, ch. 288, title III, §303A, as added Pub. L. 98–369, title VII, §2711(a)(2), July 18, 1984, 98 Stat. 1178; Pub. L. 103–355, title I, §§1061(a), (b), 1062, title IV, §4402(b), Oct. 13, 1994, 108 Stat. 3266, 3267, 3348; Pub. L. 104–106, title XLII, §4202(b)(2), Feb. 10, 1996, 110 Stat. 653.

3306(f) 41:253a note. Pub. L. 108–136, title XIV, §1428, Nov. 24, 2003, 117 Stat. 1670. In subsection (f)(2), the words "Not later than 180 days after the date of the enactment of this Act, the Federal Acquisition Regulatory Council shall amend" are omitted as obsolete.

Editorial Notes

Amendments

2018—Subsec. (b). Pub. L. 115–232, §836(b)(9), substituted "commercial products or commercial services" for "commercial items" in introductory provisions.

Subsec. (c)(1)(B), (C). Pub. L. 115–232, §876(1), inserted "except as provided in paragraph (3)," after subpar. designation.

Subsec. (c)(3), (4). Pub. L. 115–232, §876(2), added pars. (3) and (4).

Statutory Notes and Related Subsidiaries

Effective Date of 2018 Amendment

Amendment by section 836(b)(9) of Pub. L. 115–232 effective Jan. 1, 2020, subject to a savings provision, see section 836(h) of Pub. L. 115–232, set out as an Effective Date of 2018 Amendment; Savings Provision note under section 453b of Title 6, Domestic Security.

§3307. Preference for commercial products and commercial services

(a) Relationship of Provisions of Law to Procurement of Commercial Products and Commercial Services.—

(1) This division.—Unless otherwise specifically provided, all other provisions in this division also apply to the procurement of commercial products and commercial services.

(2) Laws listed in federal acquisition regulation.—A contract for the procurement of a commercial product or commercial service entered into by the head of an executive agency is not subject to a law properly listed in the Federal Acquisition Regulation pursuant to section 1906 of this title.

(b) Preference.—The head of each executive agency shall ensure that, to the maximum extent practicable—

(1) requirements of the executive agency with respect to a procurement of supplies or services are stated in terms of—

(A) functions to be performed;

(B) performance required; or

(C) essential physical characteristics;

(2) those requirements are defined so that commercial services or commercial products or, to the extent that commercial products suitable to meet the executive agency's needs are not available, nondevelopmental items other than commercial products may be procured to fulfill those requirements; and

(3) offerors of commercial services, commercial products, and nondevelopmental items other than commercial products are provided an opportunity to compete in any procurement to fill those requirements.

(c) Implementation.—The head of each executive agency shall ensure that procurement officials in that executive agency, to the maximum extent practicable—

(1) acquire commercial services or commercial products or nondevelopmental items other than commercial products to meet the needs of the executive agency;

(2) require that prime contractors and subcontractors at all levels under contracts of the executive agency incorporate commercial services or commercial products or nondevelopmental items other than commercial products as components of items supplied to the executive agency;

(3) modify requirements in appropriate cases to ensure that the requirements can be met by commercial services or commercial products or, to the extent that commercial products suitable to meet the executive agency's needs are not available, nondevelopmental items other than commercial products;

(4) state specifications in terms that enable and encourage bidders and offerors to supply commercial services or commercial products or, to the extent that commercial products suitable to meet the executive agency's needs are not available, nondevelopmental items other than commercial products in response to the executive agency solicitations;

(5) revise the executive agency's procurement policies, practices, and procedures not required by law to reduce any impediments in those policies, practices, and procedures to the acquisition of commercial products and commercial services; and

(6) require training of appropriate personnel in the acquisition of commercial products and commercial services.

(d) Market Research.—

(1) When to be used.—The head of an executive agency shall conduct market research appropriate to the circumstances—

(A) before developing new specifications for a procurement by that executive agency; and

(B) before soliciting bids or proposals for a contract in excess of the simplified acquisition threshold.

(2) Use of results.—The head of an executive agency shall use the results of market research to determine whether commercial services or commercial products or, to the extent that commercial products suitable to meet the executive agency's needs are not available, nondevelopmental items other than commercial products are available that—

(A) meet the executive agency's requirements;

(B) could be modified to meet the executive agency's requirements; or

(C) could meet the executive agency's requirements if those requirements were modified to a reasonable extent.

(3) Only minimum information required to be submitted.—In conducting market research, the head of an executive agency should not require potential sources to submit more than the minimum information that is necessary to make the determinations required in paragraph (2).

(4) Documentation.—The head of the agency shall document the results of market research in a manner appropriate to the size and complexity of the acquisition.

(e) Regulations.—

(1) In general.—The Federal Acquisition Regulation shall provide regulations to implement this section, sections 102, 103, 103a, 104, 105, and 110 of this title, and chapter 247 of title 10.

(2) Contract clauses.—

(A) Definition.—In this paragraph, the term "subcontract" includes a transfer of commercial products or commercial services between divisions, subsidiaries, or affiliates of a contractor or subcontractor.

(B) List of clauses to be included.—The regulations prescribed under paragraph (1) shall contain a list of contract clauses to be included in contracts for the acquisition of end items that are commercial products. To the maximum extent practicable, the list shall include only those contract clauses that are—

(i) required to implement provisions of law or executive orders applicable to acquisitions of commercial products, commercial components, or commercial services; or

(ii) determined to be consistent with standard commercial practice.

(C) Requirements of prime contractor.—The regulations shall provide that the Federal Government shall not require a prime contractor to apply to any of its divisions, subsidiaries, affiliates, subcontractors, or suppliers that are furnishing commercial products or commercial services any contract clause except those that are—

(i) required to implement provisions of law or executive orders applicable to subcontractors furnishing commercial products, commercial components, or commercial services; or

(ii) determined to be consistent with standard commercial practice.

(D) Clauses that may be used in a contract.—To the maximum extent practicable, only the contract clauses listed pursuant to subparagraph (B) may be used in a contract, and only the contract clauses referred to in subparagraph (C) may be required to be used in a subcontract, for the acquisition of commercial products, commercial components, or commercial services by or for an executive agency.

(E) Waiver of contract clauses.—The Federal Acquisition Regulation shall provide standards and procedures for waiving the use of contract clauses required pursuant to subparagraph (B), other than those required by law, including standards for determining the cases in which a waiver is appropriate.

(3) Market acceptance.—

(A) Requirement of offerors.—The Federal Acquisition Regulation shall provide that under appropriate conditions the head of an executive agency may require offerors to demonstrate that the items offered—

(i) have achieved commercial market acceptance or been satisfactorily supplied to an executive agency under current or recent contracts for the same or similar requirements; and

(ii) otherwise meet the item description, specifications, or other criteria prescribed in the public notice and solicitation relating to the contract.

(B) Regulation to provide guidance on criteria.—The Federal Acquisition Regulation shall provide guidance to ensure that the criteria for determining commercial market acceptance include the consideration of—

- (i) the minimum needs of the executive agency concerned; and
- (ii) the entire relevant commercial market, including small businesses.

(4) Provisions relating to types of contracts.—

(A) Types of contracts that may be used.—The Federal Acquisition Regulation shall include, for acquisitions of commercial products or commercial services—

(i) a requirement that firm, fixed price contracts or fixed price with economic price adjustment contracts be used to the maximum extent practicable;

(ii) a prohibition on use of cost type contracts; and

(iii) subject to subparagraph (B), authority for use of a time-and-materials or labor-hour contract for the procurement of commercial services that are commonly sold to the general public through those contracts and are purchased by the procuring agency on a competitive basis.

(B) When time-and-materials or labor-hour contract may be used.—A time-and-materials or labor-hour contract may be used pursuant to the authority referred to in subparagraph (A)(iii)—

(i) only for a procurement of commercial services in a category of commercial services described in subparagraph (C); and

(ii) only if the contracting officer for the procurement—

(I) executes a determination and findings that no other contract type is suitable;

(II) includes in the contract a ceiling price that the contractor exceeds at its own risk; and

(III) authorizes a subsequent change in the ceiling price only on a determination, documented in the contract file, that it is in the best interest of the procuring agency to change the ceiling price.

(C) Categories of commercial services.—The categories of commercial services referred

to in subparagraph (B) are as follows:

(i) Commercial services procured for support of a commercial product, as described in section 103a(1) of this title.

(ii) Any other category of commercial services that the Administrator for Federal Procurement Policy designates in the Federal Acquisition Regulation for the purposes of this subparagraph on the basis that—

(I) the commercial services in the category are of a type of commercial services that are commonly sold to the general public through use of time-and-materials or labor-hour contracts; and

(II) it would be in the best interests of the Federal Government to authorize use of time-and-materials or labor-hour contracts for purchases of the commercial services in the category.

(5) Contract quality requirements.—Regulations prescribed under paragraph (1) shall include provisions that—

(A) allow, to the maximum extent practicable, a contractor under a commercial products acquisition to use the existing quality assurance system of the contractor as a substitute for compliance with an otherwise applicable requirement for the Federal Government to inspect or test the commercial products before the contractor's tender of those products for acceptance by the Federal Government;

(B) require that, to the maximum extent practicable, the executive agency take advantage of warranties (including extended warranties) offered by offerors of commercial products and use those warranties for the repair and replacement of commercial products; and

(C) set forth guidance regarding the use of past performance of commercial products and sources as a factor in contract award decisions.

(Pub. L. 111–350, §3, Jan. 4, 2011, 124 Stat. 3754; Pub. L. 115–232, div. A, title VIII, §836(b)(10)(A), (B)(i), Aug. 13, 2018, 132 Stat. 1861–1863; Pub. L. 116–92, div. A, title VIII, §818(b), Dec. 20, 2019, 133 Stat. 1488; Pub. L. 117–81, div. A, title XVII, §1702(h) (13), Dec. 27, 2021, 135 Stat. 2158.)

Historical and Revision Notes

Revised

Section

Source (U.S. Code) Source (Statutes at Large)

3307(a) 41:264. June 30, 1949, ch. 288, title III, §§314, 314B, as added Pub. L. 103-355, title VIII, §8201, 8203, Oct. 13, 1994, 108 Stat. 3394.

3307(b) 41:264b(a).

3307(c) 41:264b(b).

3307(d) 41:264b(c).

3307(e) 41:264 note. Pub. L. 103-355, title VIII, §8002, Oct. 13, 1994, 108 Stat. 3386; Pub. L. 108-136, title XIV, 1432, Nov. 24, 2003, 117 Stat. 1672.

Subsection (a)(1) is substituted for 41 U.S.C. 264(a) for clarity.

In subsection (e), the text of section 8002(f) of the Federal Acquisition Streamlining Act of 1994 (Public Law 103-355, 41 U.S.C. 264 note) is omitted as obsolete.

In subsection (e)(2)(B)(i) and (C)(i), the words "as the case may be" are omitted as unnecessary.

Editorial Notes

Amendments

2021—Subsec. (e)(1). Pub. L. 117-81 substituted "chapter 247" for "chapter 140".

2019—Subsec. (d)(4). Pub. L. 116-92 added par. (4).

2018—Pub. L. 115-232, §836(b)(10)(B)(i), substituted "Preference for commercial products and commercial services" for "Preference for commercial items" in section catchline.

Subsec. (a). Pub. L. 115-232, §836(b)(10)(A)(i)(I), substituted "Commercial Products and Commercial Services" for "Commercial Items" in heading.

Subsec. (a)(1). Pub. L. 115-232, §836(b)(10)(A)(i)(II), substituted "commercial products and commercial services" for "commercial items".

Subsec. (a)(2). Pub. L. 115-232, §836(b)(10)(A)(i)(III), substituted "a commercial product or commercial service" for "a commercial item".

Subsec. (b)(2). Pub. L. 115-232, §836(b)(10)(A)(ii)(I), substituted "commercial services or commercial products or, to the extent that commercial products suitable to meet the executive agency's needs are not available, nondevelopmental items other than commercial products" for "commercial items or, to the extent that commercial items suitable to meet the executive agency's needs are not available, nondevelopmental items other than commercial items".

Subsec. (b)(3). Pub. L. 115–232, §836(b)(10)(A)(ii)(II), substituted "commercial services, commercial products, and nondevelopmental items other than commercial products" for "commercial items and nondevelopmental items other than commercial items".

Subsec. (c)(1), (2). Pub. L. 115–232, §836(b)(10)(A)(iii)(I), substituted "commercial services or commercial products or nondevelopmental items other than commercial products" for "commercial items or nondevelopmental items other than commercial items".

Subsec. (c)(3), (4). Pub. L. 115–232, §836(b)(10)(A)(iii)(II), substituted "commercial services or commercial products or, to the extent that commercial products suitable to meet the executive agency's needs are not available, nondevelopmental items other than commercial products" for "commercial items or, to the extent that commercial items suitable to meet the executive agency's needs are not available, nondevelopmental items other than commercial items".

Subsec. (c)(5), (6). Pub. L. 115–232, §836(b)(10)(A)(iii)(III), substituted "commercial products and commercial services" for "commercial items".

Subsec. (d)(2). Pub. L. 115–232, §836(b)(10)(A)(iv), in introductory provisions, substituted "commercial services or commercial products or, to the extent that commercial products suitable to meet the executive agency's needs are not available, nondevelopmental items other than commercial products" for "commercial items or, to the extent that commercial items suitable to meet the executive agency's needs are not available, nondevelopmental items other than commercial items".

Subsec. (e)(1). Pub. L. 115–232, §836(b)(10)(A)(v)(I), inserted "103a, 104," after "sections 102, 103,".

Subsec. (e)(2)(A). Pub. L. 115–232, §836(b)(10)(A)(v)(II), substituted "commercial products or commercial services" for "commercial items".

Subsec. (e)(2)(B). Pub. L. 115–232, §836(b)(10)(A)(v)(III), (IV), in introductory provisions, substituted "end items that are commercial products" for "commercial end items" and, in cl. (i), substituted "commercial products, commercial components, or commercial services" for "commercial items or commercial components".

Subsec. (e)(2)(C). Pub. L. 115–232, §836(b)(10)(A)(v)(IV), (V), in introductory provisions, substituted "commercial products or commercial services" for "commercial items" and, in cl. (i), substituted "commercial products, commercial components, or commercial services" for "commercial items or commercial components".

Subsec. (e)(2)(D). Pub. L. 115–232, §836(b)(10)(A)(v)(IV), substituted "commercial products, commercial components, or commercial services" for "commercial items or commercial components".

Subsec. (e)(4)(A). Pub. L. 115–232, §836(b)(10)(A)(v)(VI), substituted "commercial products or commercial services" for "commercial items" in introductory provisions.

Subsec. (e)(4)(C)(i). Pub. L. 115–232, §836(b)(10)(A)(v)(VII), substituted "commercial product, as described in section 103a(1)" for "commercial item, as described in section 103(5)".

Subsec. (e)(5). Pub. L. 115–232, §836(b)(10)(A)(v)(VIII), substituted "products" for "items" wherever appearing.

Statutory Notes and Related Subsidiaries

Effective Date of 2018 Amendment

Amendment by Pub. L. 115–232 effective Jan. 1, 2020, subject to a savings provision, see section 836(h) of Pub. L. 115–232, set out as an Effective Date of 2018 Amendment; Savings Provision note under section 453b of Title 6, Domestic Security.

§3308. Planning for future competition in contracts for major systems

(a) Development Contract.—

(1) Determining whether proposals are necessary.—In preparing a solicitation for the award of a development contract for a major system, the head of an agency shall consider requiring in the solicitation that an offeror include in its offer proposals described in paragraph (2). In determining whether to require the proposals, the head of the agency shall consider the purposes for which the system is being procured and the technology necessary to meet the system's required capabilities. If the proposals are required, the head of the agency shall consider them in evaluating the offeror's price.

(2) Contents of proposals.—The proposals that the head of an agency is to consider requiring in a solicitation for the award of a development contract are the following:

(A) Proposals to incorporate in the design of the major system items that are currently available within the supply system of the Federal agency responsible for the major system, available elsewhere in the national supply system, or commercially available from more than one source.

(B) With respect to items that are likely to be required in substantial quantities during the system's service life, proposals to incorporate in the design of the major system items that the Federal Government will be able to acquire competitively in the future.

(b) Production Contract.—

(1) Determining whether proposals are necessary.—In preparing a solicitation for the award of a production contract for a major system, the head of an agency shall consider requiring in the solicitation that an offeror include in its offer proposals described in paragraph (2). In determining whether to require the proposals, the head of the agency shall consider the purposes for which the system is being procured and the technology necessary to meet the system's required capabilities. If the proposals are required, the head of the agency shall consider them in evaluating the offeror's price.

(2) Content of proposals.—The proposals that the head of an agency is to consider requiring in a solicitation for the award of a production contract are proposals identifying opportunities to ensure that the Federal Government will be able to obtain on a competitive basis items procured in connection with the system that are likely to be reprocured in substantial quantities during the service life of the system. Proposals submitted in response to this requirement may include the following:

(A) Proposals to provide to the Federal Government the right to use technical data to be provided under the contract for competitive reprocurement of the item, together with the cost to the Federal Government of acquiring the data and the right to use the data.

(B) Proposals for the qualification or development of multiple sources of supply for the item.

(c) Consideration of Factors as Objectives in Negotiations.—If the head of an agency is making a noncompetitive award of a development contract or a production contract for a major system, the factors specified in subsections (a) and (b) to be considered in evaluating an offer for a contract may be considered as objectives in negotiating the contract to be awarded.

(Pub. L. 111–350, §3, Jan. 4, 2011, 124 Stat. 3758.)

Historical and Revision Notes

Revised

Section

Source (U.S. Code) Source (Statutes at Large)

3308 41:253b(j). June 30, 1949, ch. 288, title III, §303B(j), formerly §303B(f), as added Pub. L. 98–577, title II, §201(a), Oct. 30, 1984, 98 Stat. 3068; redesignated as §303B(g), Pub. L. 103–355, title I, §1064(1), Oct. 13, 1994, 108 Stat. 3268; redesignated as

§303B(j), Pub. L. 104–106, title XLI, §4104(b)(2), Feb. 10, 1996, 110 Stat. 645.

§3309. Design-build selection procedures

(a) Authorization.—Unless the traditional acquisition approach of design-bid-build established under sections 1101 to 1104 of title 40 or another acquisition procedure authorized by law is used, the head of an executive agency shall use the two-phase selection procedures authorized in this section for entering into a contract for the design and construction of a public building, facility, or work when a determination is made under subsection (b) that the procedures are appropriate for use.

(b) Criteria for Use.—A contracting officer shall make a determination whether two-phase selection procedures are appropriate for use for entering into a contract for the design and construction of a public building, facility, or work when—

(1) the contracting officer anticipates that 3 or more offers will be received for the contract;

(2) design work must be performed before an offeror can develop a price or cost proposal for the contract;

(3) the offeror will incur a substantial amount of expense in preparing the offer; and

(4) the contracting officer has considered information such as the following:

(A) The extent to which the project requirements have been adequately defined.

(B) The time constraints for delivery of the project.

(C) The capability and experience of potential contractors.

(D) The suitability of the project for use of the two-phase selection procedures.

(E) The capability of the agency to manage the two-phase selection process.

(F) Other criteria established by the agency.

(c) Procedures Described.—Two-phase selection procedures consist of the following:

(1) Development of scope of work statement.—The agency develops, either in-house or by contract, a scope of work statement for inclusion in the solicitation that defines the project and provides prospective offerors with sufficient information regarding the Federal Government's requirements (which may include criteria and preliminary design, budget parameters, and schedule or delivery requirements) to enable the offerors to

submit proposals that meet the Federal Government's needs. If the agency contracts for development of the scope of work statement, the agency shall contract for architectural and engineering services as defined by and in accordance with sections 1101 to 1104 of title 40.

(2) Solicitation of phase-one proposals.—The contracting officer solicits phase-one proposals that—

(A) include information on the offeror's—

(i) technical approach; and

(ii) technical qualifications; and

(B) do not include—

(i) detailed design information; or

(ii) cost or price information.

(3) Evaluation factors.—The evaluation factors to be used in evaluating phase-one proposals are stated in the solicitation and include specialized experience and technical competence, capability to perform, past performance of the offeror's team (including the architect-engineer and construction members of the team), and other appropriate factors, except that cost-related or price-related evaluation factors are not permitted. Each solicitation establishes the relative importance assigned to the evaluation factors and subfactors that must be considered in the evaluation of phase-one proposals. The agency evaluates phase-one proposals on the basis of the phase-one evaluation factors set forth in the solicitation.

(4) Selection by contracting officer.—

(A) Number of offerors selected and what is to be evaluated.—The contracting officer selects as the most highly qualified the number of offerors specified in the solicitation to provide the property or services under the contract and requests the selected offerors to submit phase-two competitive proposals that include technical proposals and cost or price information. Each solicitation establishes with respect to phase two—

(i) the technical submission for the proposal, including design concepts or proposed solutions to requirements addressed within the scope of work, or both; and

(ii) the evaluation factors and subfactors, including cost or price, that must be considered in the evaluations of proposals in accordance with subsections (b) to (d) of section 3306 of this title.

(B) Separate evaluations.—The contracting officer separately evaluates the submissions described in clauses (i) and (ii) of subparagraph (A).

(5) Awarding of contract.—The agency awards the contract in accordance with chapter 37 of this title.

(d) Solicitation To State Number of Offerors To Be Selected for Phase-Two Requests for Competitive Proposals.—A solicitation issued pursuant to the procedures described in subsection (c) shall state the maximum number of offerors that are to be selected to submit competitive proposals pursuant to subsection (c)(4). The maximum number specified in the solicitation shall not exceed 5 unless the agency determines with respect to an individual solicitation that a specified number greater than 5 is in the Federal Government's interest and is consistent with the purposes and objectives of the two-phase selection process.

(e) Requirement for Guidance and Regulations.—The Federal Acquisition Regulation shall include guidance—

(1) regarding the factors that may be considered in determining whether the two-phase contracting procedures authorized by subsection (a) are appropriate for use in individual contracting situations;

(2) regarding the factors that may be used in selecting contractors; and

(3) providing for a uniform approach to be used Government-wide.

(Pub. L. 111–350, §3, Jan. 4, 2011, 124 Stat. 3759.)

Historical and Revision Notes

Revised

Section

Source (U.S. Code) Source (Statutes at Large)

3309 41:253m. June 30, 1949, ch. 288, title III, §303M, as added Pub. L. 104–106, div. D, title XLI, §4105(b)(1), Feb. 10, 1996, 110 Stat. 647.

In subsections (a) and (c)(1), the words "sections 1101 to 1104 of title 40" are

substituted for "the Brooks Architect-Engineers Act (title IX of this Act)" and "the Brooks Architect-Engineers Act (40 U.S.C. 541 et seq.)", respectively, because of section 5(c) of Public Law 107–217 (40 U.S.C. note prec. 101) and for consistency with title 40.

In subsection (c)(5), the reference to section 253b of this title is limited to chapter 37 of the revised title for clarity.

Statutory Notes and Related Subsidiaries

Prohibition on Use of a Reverse Auction for the Award of a Contract for Complex, Specialized, or Substantial Design and Construction Services

Pub. L. 116–260, div. U, title IV, §402, Dec. 27, 2020, 134 Stat. 2292, as amended by Pub. L. 117–28, §2, July 26, 2021, 135 Stat. 304, provided that:

"(a) Findings.—Congress makes the following findings:

"(1) In contrast to a traditional auction in which the buyers bid up the price, sellers bid down the price in a reverse auction.

"(2) Reverse auctions, while providing value for the vast majority of Federal acquisitions, including certain construction-related acquisitions, are limited in value for complex, specialized, or substantial design and construction services.

"(b) Reverse Auction Defined.—In this section, the term 'reverse auction' means, with respect to any procurement by an executive agency, a real-time auction generally conducted through an electronic medium among two or more offerors who compete by submitting bids for a supply or service contract, or a delivery order, task order, or purchase order under the contract, with the ability to submit revised lower bids at any time before the closing of the auction.

"(c) Prohibition.—

"(1) In general.—Not later than 270 days after the date of the enactment of this section [July 26, 2021], the Federal Acquisition Regulation shall be amended to prohibit the use of reverse auctions for awarding contracts for complex, specialized, or substantial design and construction services.

"(2) Applicability to acquisitions above the simplified acquisition threshold.—The prohibition on reverse auctions for complex, specialized, or substantial design and construction services shall apply only to acquisitions above the simplified acquisition threshold (SAT) for construction and design services pursuant to part 36 of the Federal Acquisition Regulation.

"(d) Rulemaking for Complex, Specialized, or Substantial Services.—Not later than 180 days after the date of the enactment of this section, the Federal Acquisition Regulatory Council shall promulgate a definition of complex, specialized, or substantial design and construction services, which shall include—

"(1) site planning and landscape design;

"(2) architectural and engineering services (as defined in section 1102 of title 40, United States Code);

"(3) interior design;

"(4) performance of substantial construction work for facility, infrastructure, and environmental restoration projects; and

"(5) construction or substantial alteration of public buildings or public works.

"(e) Rule of Construction.—Nothing in this section shall be construed to restrict the use of reverse auctions for the procurement of other goods and services except as specifically provided for under this section.

"(f) Report.—Not later than two years after the date of the enactment of this section, the Administrator of General Services shall submit to the Committee on Homeland Security and Governmental Affairs of the Senate and the Committee on Oversight and Reform of the House of Representatives a report on the effectiveness of this section in delivering complex, specialized, or substantial design and construction services to the United States Government."

§3310. Quantities to order

(a) Factors Affecting Quantity To Order.—Each executive agency shall procure supplies in a quantity that—

(1) will result in the total cost and unit cost most advantageous to the Federal Government, where practicable; and

(2) does not exceed the quantity reasonably expected to be required by the agency.

(b) Offeror's Opinion of Quantity.—Each solicitation for a contract for supplies shall, if practicable, include a provision inviting each offeror responding to the solicitation to state an opinion on whether the quantity of supplies proposed to be procured is economically advantageous to the Federal Government and, if applicable, to recommend a quantity that would be more economically advantageous to the Federal

Government. Each recommendation shall include a quotation of the total price and the unit price for supplies procured in each recommended quantity.

(Pub. L. 111–350, §3, Jan. 4, 2011, 124 Stat. 3761.)

Historical and Revision Notes

Revised

Section

Source (U.S. Code) Source (Statutes at Large)

3310 41:253f. June 30, 1949, ch. 288, title III, §303F, formerly §303G, as added Pub. L. 98–577, title II, §205(a), Oct. 30, 1984, 98 Stat. 3073; renumbered §303F, Pub. L. 99–145, title XIII, §1304(c)(4)(A), Nov. 8, 1985, 99 Stat. 742.

In subsection (b), the words "or quantities" are omitted because of 1:1.

§3311. Qualification requirement

(a) Definition.—In this section, the term "qualification requirement" means a requirement for testing or other quality assurance demonstration that must be completed by an offeror before award of a contract.

(b) Actions Before Enforcing Qualification Requirement.—Except as provided in subsection (c), the head of an agency, before enforcing any qualification requirement, shall—

(1) prepare a written justification stating the necessity for establishing the qualification requirement and specify why the qualification requirement must be demonstrated before contract award;

(2) specify in writing and make available to a potential offeror on request all requirements that a prospective offeror, or its product, must satisfy to become qualified, with those requirements to be limited to those least restrictive to meet the purposes necessitating the establishment of the qualification requirement;

(3) specify an estimate of the cost of testing and evaluation likely to be incurred by a potential offeror to become qualified;

(4) ensure that a potential offeror is provided, on request, a prompt opportunity to demonstrate at its own expense (except as provided in subsection (d)) its ability to meet the standards specified for qualification using—

(A) qualified personnel and facilities—

(i) of the agency concerned;

(ii) of another agency obtained through interagency agreement; or

(iii) under contract; or

(B) other methods approved by the agency (including use of approved testing and evaluation services not provided under contract to the agency);

(5) if testing and evaluation services are provided under contract to the agency for the purposes of paragraph (4), provide to the extent possible that those services be provided by a contractor that—

(A) is not expected to benefit from an absence of additional qualified sources; and

(B) is required in the contract to adhere to any restriction on technical data asserted by the potential offeror seeking qualification; and

(6) ensure that a potential offeror seeking qualification is promptly informed whether qualification is attained and, if not attained, is promptly furnished specific information about why qualification was not attained.

(c) Applicability, Waiver Authority, and Referral of Offers.—

(1) Applicability.—Subsection (b) does not apply to a qualification requirement established by statute prior to October 30, 1984.

(2) Waiver authority.—

(A) Submission of determination of unreasonableness.—Except as provided in subparagraph (C), if it is unreasonable to specify the standards for qualification that a prospective offeror or its product must satisfy, a determination to that effect shall be submitted to the advocate for competition of the procuring activity responsible for the purchase of the item subject to the qualification requirement.

(B) Authority to grant waiver.—After considering any comments of the advocate for competition reviewing the determination, the head of the procuring activity may waive the requirements of paragraphs (2) to (5) of subsection (b) for up to 2 years with respect to the item subject to the qualification requirement.

(C) Nonapplicability to qualified products list.—Waiver authority under this paragraph does not apply with respect to a qualified products list.

(3) Submission and consideration of offer not to be denied.—A potential offeror may not be denied the opportunity to submit and have considered an offer for a contract solely because the potential offeror has not been identified as meeting a qualification requirement if the potential offeror can demonstrate to the satisfaction of the contracting officer that the potential offeror or its product meets the standards established for qualification or can meet those standards before the date specified for award of the contract.

(4) Referral to small business administration not required.—This subsection does not require the referral of an offer to the Small Business Administration pursuant to section 8(b)(7) of the Small Business Act (15 U.S.C. 637(b)(7)) if the basis for the referral is a challenge by the offeror to either the validity of the qualification requirement or the offeror's compliance with that requirement.

(5) Delay of procurement not required.—The head of an agency need not delay a proposed procurement to comply with subsection (b) or to provide a potential offeror with an opportunity to demonstrate its ability to meet the standards specified for qualification.

(d) Fewer Than 2 Actual Manufacturers.—

(1) Solicitation and testing of additional sources or products.—If the number of qualified sources or qualified products available to compete actively for an anticipated future requirement is fewer than 2 actual manufacturers or the products of 2 actual manufacturers, respectively, the head of the agency concerned shall—

(A) publish notice periodically soliciting additional sources or products to seek qualification, unless the contracting officer determines that doing so would compromise national security; and

(B) subject to paragraph (2), bear the cost of conducting the specified testing and evaluation (excluding the cost associated with producing the item or establishing the production, quality control, or other system to be tested and evaluated) for a small business concern or a product manufactured by a small business concern that has met the standards specified for qualification and that could reasonably be expected to compete for a contract for that requirement.

(2) When agency may bear cost.—The head of the agency concerned may bear the cost under paragraph (1)(B) only if the head of the agency determines that the additional qualified sources or products are likely to result in cost savings from increased competition for future requirements sufficient to offset (within a reasonable period of time considering the duration and dollar value of anticipated future requirements) the cost incurred by the agency.

(3) Certification required.—The head of the agency shall require a prospective contractor requesting the Federal Government to bear testing and evaluation costs under paragraph (1)(B) to certify its status as a small business concern under section 3 of the Small Business Act (15 U.S.C. 632).

(e) Examination and Revalidation of Qualification Requirement.—Within 7 years after the establishment of a qualification requirement, the need for the requirement shall be examined and the standards of the requirement revalidated in accordance with the requirements of subsection (b). This subsection does not apply in the case of a qualification requirement for which a waiver is in effect under subsection (c)(2).

(f) When Enforcement of Qualification Requirement Not Allowed.—Except in an emergency as determined by the head of the agency, after the head of the agency determines not to enforce a qualification requirement for a solicitation, the agency may not enforce the requirement unless the agency complies with the requirements of subsection (b).

(Pub. L. 111–350, §3, Jan. 4, 2011, 124 Stat. 3761.)

Historical and Revision Notes

Revised
Section

Source (U.S. Code) Source (Statutes at Large)

3311 41:253c. June 30, 1949, ch. 288, title III, §303C, formerly §303D, as added Pub. L. 98–577, title II, §202(a), Oct. 30, 1984, 98 Stat. 3069; renumbered §303C, Pub. L. 99–145, title XIII, §1304(c)(4)(A), Nov. 8, 1985, 99 Stat. 742.

In subsection (d)(1)(A), the words "in the Commerce Business Daily" are omitted as obsolete. See revision note for section 1708(d) of the revised title.

§3312. Database on price trends of items and services under Federal contracts

(a) Database Required.—The Administrator shall establish and maintain a database of information on price trends for items and services under contracts with the Federal Government. The information in the database shall be designed to assist Federal acquisition officials in the following:

(1) Monitoring developments in price trends for items and services under contracts with the Federal Government.

(2) Conducting price or cost analyses for items and services under offers for contracts with the Federal Government, or otherwise conducting determinations of the reasonableness of prices for items and services under such offers, and addressing unjustified escalation in prices being paid by the Federal Government for items and services under contracts with the Federal Government.

(b) Use.—(1) The database under subsection (a) shall be available to executive agencies in the evaluation of offers for contracts with the Federal Government for items and services.

(2) The Secretary of Defense may satisfy the requirements of this section by complying with the requirements of section 892 1 of the Ike Skelton National Defense Authorization Act for Fiscal Year 2011 (10 U.S.C. 2306a note).

(Added Pub. L. 112–239, div. A, title VIII, §851(a)(1), Jan. 2, 2013, 126 Stat. 1855.)

Editorial Notes

References in Text

Section 892 of the Ike Skelton National Defense Authorization Act for Fiscal Year 2011, referred to in subsec. (b)(2), is section 892 of Pub. L. 111–383, which was formerly set out as a note under section 2306a of Title 10, Armed Forces, prior to repeal by Pub. L. 114–92, div. A, title X, §1073(f), Nov. 25, 2015, 129 Stat. 996.

Statutory Notes and Related Subsidiaries

Use of Elements of Department of Defense Pilot Project

Pub. L. 112–239, div. A, title VIII, §851(b), Jan. 2, 2013, 126 Stat. 1855, provided that: "In establishing the database required by section 3312 of title 41, United States Code (as added by subsection (a)), the Administrator for Federal Procurement Policy shall use and incorporate appropriate elements of the pilot project on pricing being carried out by the Under Secretary of Defense for Acquisition, Technology, and Logistics pursuant to section 892 of the Ike Skelton National Defense Authorization Act for Fiscal Year 2011 [Pub. L. 111–383] (10 U.S.C. 2306a note) and the Better Buying Power initiative of the Secretary of Defense."

¹ See References in Text note below.

EVIDENCE

41 USC 3301: Full and open competition

Text contains those laws in effect on September 7, 2023

From Title 41-PUBLIC CONTRACTS

Subtitle I-Federal Procurement Policy

Division C-Procurement

CHAPTER 33-PLANNING AND SOLICITATION

Jump To:

Source Credit

Miscellaneous

References In Text

Regulations

Construction

§3301. Full and open competition

(a) In General.-Except as provided in sections 3303, 3304(a), and 3305 of this title and except in the case of procurement procedures otherwise expressly authorized by statute, an executive agency in conducting a procurement for property or services shall-

(1) obtain full and open competition through the use of competitive procedures in accordance with the requirements of this division and the Federal Acquisition Regulation; and

(2) use the competitive procedure or combination of competitive procedures that is best suited under the circumstances of the procurement.

(b) Appropriate Competitive Procedures.-

(1) Use of sealed bids.-In determining the competitive procedures appropriate under the circumstance, an executive agency shall-

(A) solicit sealed bids if-

(i) time permits the solicitation, submission, and evaluation of sealed bids;

(ii) the award will be made on the basis of price and other price-related factors;

(iii) it is not necessary to conduct discussions with the responding sources about their

bids; and

(iv) there is a reasonable expectation of receiving more than one sealed bid; or

(B) request competitive proposals if sealed bids are not appropriate under subparagraph (A).

(2) Sealed bid not required.-Paragraph (1)(A) does not require the use of sealed-bid procedures in cases in which section 204(e) 1 of title 23 applies.

(c) Efficient Fulfillment of Government Requirements.-The Federal Acquisition Regulation shall ensure that the requirement to obtain full and open competition is implemented in a manner that is consistent with the need to efficiently fulfill the Federal Government's requirements.

(Pub. L. 111–350, §3, Jan. 4, 2011, 124 Stat. 3745 .)

Historical and Revision Notes

Revised

Section

Source (U.S. Code) Source (Statutes at Large)

3301(a) 41:253(a)(1). June 30, 1949, ch. 288, title III, §303(a), 63 Stat. 395 ; July 12, 1952, ch. 703, §1(m), 66 Stat. 594 ; Pub. L. 90–268, §2, Mar. 16, 1968, 82 Stat. 49 ; Pub. L. 98–369, title VII, §2711(a)(1), July 18, 1984, 98 Stat. 1175 ; Pub. L. 103–355, title I, §1051(1), Oct. 13, 1994, 108 Stat. 3260 .

3301(b)(1) 41:253(a)(2).

3301(b)(2) 41:252(c)(2). June 30, 1949, ch. 288, title III, §302(c)(2), as added Pub. L. 98–369, title VII, §2714(a)(1)(B), July 18, 1984, 98 Stat. 1184 .

3301(c) 41:253(h). June 30, 1949, ch. 288, title III, §303(h), as added Pub. L. 104–106, title XLI, §4101(b)(2), Feb. 10, 1996, 110 Stat. 642 .

Editorial Notes

References in Text

Section 204 of title 23, referred to in subsec. (b)(2), was repealed and a new section 204 enacted by Pub. L. 112–141, div. A, title I, §1119(a), July 6, 2012, 126 Stat. 473 , 489.

Statutory Notes and Related Subsidiaries

Regulations

Pub. L. 113–291, div. A, title VIII, §836, Dec. 19, 2014, 128 Stat. 3449 , provided that:
"Not later than 180 days after the date of the enactment of this Act [Dec. 19, 2014], the Administrator for Federal Procurement Policy shall prescribe regulations providing that when the Federal Government makes a purchase of services and supplies offered under the Federal Strategic Sourcing Initiative (managed by the Office of Federal Procurement Policy) but such Initiative is not used, the contract file for the purchase shall include a brief analysis of the comparative value, including price and nonprice factors, between the services and supplies offered under such Initiative and services and supplies offered under the source or sources used for the purchase."

Construction

Pub. L. 98–369, div. B, title VII, §2711(c), July 18, 1984, 98 Stat. 1181 , provided that:
"The amendments made by this section [see Tables for classification] do not supersede or affect the provisions of section 8(a) of the Small Business Act (15 U.S.C. 637(a))."

Pilot Programs for Authority To Acquire Innovative Commercial Items Using General Solicitation Competitive Procedures

Pub. L. 114–328, div. A, title VIII, §880, Dec. 23, 2016, 130 Stat. 2313 , as amended by Pub. L. 115–232, div. A, title VIII, §836(f)(10), Aug. 13, 2018, 132 Stat. 1872 ; Pub. L. 117–263, div. G, title LXXII, §7227(a), Dec. 23, 2022, 136 Stat. 3675 , provided that:

"(a) Authority.-

"(1) In general.-The head of an agency may carry out a pilot program, to be known as a 'commercial solutions opening pilot program', under which innovative commercial products may be acquired through a competitive selection of proposals resulting from a general solicitation and the peer review of such proposals.

"(2) Head of an agency.-In this section, the term 'head of an agency' means the following:

"(A) The Secretary of Homeland Security.

"(B) The Administrator of General Services.

"(3) Applicability of section.-This section applies to the following agencies:

"(A) The Department of Homeland Security.

"(B) The General Services Administration.

"(b) Treatment as Competitive Procedures.-Use of general solicitation competitive procedures for the pilot program under subsection (a) shall be considered, in the case of

the Department of Homeland Security and the General Services Administration, to be use of competitive procedures for purposes of division C of [subtitle I of] title 41, United States Code (as defined in section 152 of such title).

"(c) Limitation.-The head of an agency may not enter into a contract under the pilot program for an amount in excess of \$25,000,000.

"(d) Guidance.-The head of an agency shall issue guidance for the implementation of the pilot program under this section within that agency. Such guidance shall be issued in consultation with the Office of Management and Budget and shall be posted for access by the public.

"(e) Report Required.-

"(1) In general.-Not later than three years after the date of the enactment of this Act [Dec. 23, 2016], the head of an agency shall submit to the congressional committees specified in paragraph (3) a report on the activities the agency carried out under the pilot program.

"(2) Elements of report.-Each report under this subsection shall include the following:

"(A) An assessment of the impact of the pilot program on competition.

"(B) A comparison of acquisition timelines for-

"(i) procurements made using the pilot program; and

"(ii) procurements made using other competitive procedures that do not use general solicitations.

"(C) A recommendation on whether the authority for the pilot program should be made permanent.

"(3) Specified congressional committees.-The congressional committees specified in this paragraph are the Committee on Homeland Security and Governmental Affairs of the Senate and the Committee on Oversight and Government Reform [now Committee on Oversight and Reform] of the House of Representatives.

"(f) Definitions.-In this section-

"(1) the term 'commercial product'-

"(A) has the meaning given the term 'commercial item' in section 2.101 of the Federal

Acquisition Regulation; and

"(B) includes a commercial product or a commercial service, as defined in sections 103 and 103a, respectively, of title 41, United States Code; and

"(2) the term 'innovative' means-

"(A) any new technology, process, or method, including research and development; or

"(B) any new application of an existing technology, process, or method.

"(g) Termination.-The authority to enter into a contract under a pilot program under this section terminates on September 30, 2027."

Governmentwide Software Purchasing Program

Pub. L. 113-291, div. A, title VIII, §837, Dec. 19, 2014, 128 Stat. 3450 , provided that:

"(a) In General.-The Administrator of General Services shall identify and develop a strategic sourcing initiative to enhance Governmentwide acquisition, shared use, and dissemination of software, as well as compliance with end user license agreements.

"(b) Governmentwide User License Agreement.-The Administrator, in developing the initiative under subsection (a), shall allow for the purchase of a license agreement that is available for use by all Executive agencies (as defined in section 105 of title 5, United States Code) as one user to the maximum extent practicable and as appropriate."

¹ See References in Text note below.

EVIDENCE

[Congressional Bills 117th Congress]
[From the U.S. Government Publishing Office]
[S. 3035 Reported in Senate (RS)]

<DOC>

Calendar No. 283

117th CONGRESS
2d Session

S. 3035

[Report No. 117-82]

To establish the Artificial Intelligence Hygiene Working Group, and for
other purposes.

IN THE SENATE OF THE UNITED STATES

October 21, 2021

Mr. Peters (for himself and Mr. Portman) introduced the following bill;
which was read twice and referred to the Committee on Homeland Security
and Governmental Affairs

February 28, 2022

Reported by Mr. Peters, with an amendment
[Strike out all after the enacting clause and insert the part printed
in italic]

A BILL

To establish the Artificial Intelligence Hygiene Working Group, and for
other purposes.

Be it enacted by the Senate and House of Representatives of the
United States of America in Congress assembled,

<DELETED>SECTION 1. SHORT TITLE.</DELETED>

<DELETED> This Act may be cited as the ``Government Ownership and Oversight of Data in Artificial Intelligence Act of 2021" or the ``GOOD AI Act of 2021".</DELETED>

<DELETED>SEC. 2. PRINCIPLES AND POLICIES FOR USE OF ARTIFICIAL INTELLIGENCE IN GOVERNMENT.</DELETED>

<DELETED> (a) Definitions.--In this Act:</DELETED>

<DELETED> (1) Agency.--The term ``agency" has the meaning given the term in section 3502 of title 44, United States Code.</DELETED>

<DELETED> (2) Appropriate congressional committees.--The term ``appropriate congressional committees" means--</DELETED>

<DELETED> (A) the Committee on Homeland Security and Governmental Affairs of the Senate; and</DELETED>

<DELETED> (B) the Committee on Oversight and Reform of the House of Representatives.</DELETED>

<DELETED> (3) Artificial intelligence.--The term ``artificial intelligence" has the meaning given the term in section 238(g) of the John S. McCain National Defense Authorization Act for Fiscal Year 2019 (10 U.S.C. 2358 note).</DELETED>

<DELETED> (4) Artificial intelligence system.--The term ``artificial intelligence system"--</DELETED>

<DELETED> (A) means any data system, software, application, tool, or utility that operates in whole or in part using dynamic or static machine learning algorithms or other forms of artificial intelligence, including a data system, software, application, tool, or utility--</DELETED>

<DELETED> (i) that is established primarily for the purpose of researching, developing, or implementing artificial intelligence technology; and</DELETED>

<DELETED> (ii) for which the artificial intelligence capability is integrated into another system or agency business process, operational activity, or technology system; and</DELETED>

<DELETED> (B) does not include any common or commercial product within which artificial intelligence is embedded, such as a word processor or map navigation system.</DELETED>

<DELETED> (5) Director.--The term "Director" means the Director of the Office of Management and Budget.</DELETED>
<DELETED> (b) Guidance for Agency Use of Artificial Intelligence.--</DELETED>

<DELETED> (1) In general.--In developing an update under section 104(d) of the AI in Government Act of 2020 (40 U.S.C. 11301 note) to the memorandum issued under subsection (a) of that section, the Director shall consider--</DELETED>

<DELETED> (A) the considerations and recommended practices identified by the National Security Commission on Artificial Intelligence in the report entitled "Key Considerations for Responsible Development and Fielding of AI", as updated in April 2021;</DELETED>

<DELETED> (B) the principles articulated in Executive Order 13960 (85 Fed. Reg. 78939; relating to promoting the use of trustworthy artificial intelligence in the Federal Government); and</DELETED>

<DELETED> (C) the input of--</DELETED>

<DELETED> (i) the Privacy and Civil Liberties Oversight Board;</DELETED>

<DELETED> (ii) relevant interagency councils, such as the Federal Privacy Council, the Chief Information Officers Council, and the Chief Data Officers Council;</DELETED>

<DELETED> (iii) other governmental and nongovernmental privacy, civil rights, and civil liberties experts; and</DELETED>

<DELETED> (iv) any other individual or entity the Director determines appropriate.</DELETED>

<DELETED> (2) Sunset.--This subsection shall cease to have force or effect on the date that is 4 years after the date of enactment of this Act.</DELETED>

<DELETED> (c) Artificial Intelligence Hygiene and Protection of Government Information, Privacy, Civil Rights, and Civil Liberties.--</DELETED>

<DELETED> (1) Establishment.--Not later than 45 days after the date of enactment of this Act, the Director shall establish a working group to be known as the "Artificial Intelligence Hygiene Working Group".</DELETED>

<DELETED> (2) Membership.--The Director shall appoint members to the Artificial Intelligence Hygiene Working Group from among members of appropriate interagency councils.</DELETED>

<DELETED> (3) Implementation.--Not later than 1 year after the date of enactment of this Act, the Director, in consultation with the Artificial Intelligence Hygiene Working Group, shall implement a means by which to--</DELETED>

<DELETED> (A) ensure that contracts for the acquisition of artificial intelligence and artificial intelligence systems--</DELETED>

<DELETED> (i) align with the memorandum issued, and periodically updated, by the Director under subsections (a) and (d), respectively, of section 104 of the AI in Government Act of 2020 (40 U.S.C. 11301 note);</DELETED>

<DELETED> (ii) address the protection of privacy, civil rights, and civil liberties;</DELETED>

<DELETED> (iii) address the ownership and security of data and other information created, used, processed, stored, maintained, disseminated, disclosed, or disposed of by a contractor or subcontractor on behalf of the Federal Government; and</DELETED>

<DELETED> (iv) include requirements for securing the training data, algorithms, and other components of any artificial intelligence system against--</DELETED>

<DELETED> (I) misuse;</DELETED>

<DELETED> (II) unauthorized alteration;</DELETED>

<DELETED> (III) degradation; or</DELETED>

<DELETED> (IV) being rendered inoperable; and</DELETED>

<DELETED> (B) address any other issue or concern the Director determines relevant to ensure--</DELETED>

<DELETED> (i) the appropriate use of artificial intelligence and artificial intelligence systems; and</DELETED>

<DELETED> (ii) the protection of privacy, Federal Government data, and other information of the Federal Government.</DELETED>

<DELETED> (4) Updates.--On a continuous basis, not later than 2 years after the date of enactment of this Act, and not less frequently than once every 2 years thereafter, the Director shall update the means implemented under paragraph

(3).</DELETED>

<DELETED> (5) Briefing.--Not later than 90 days after the date of enactment of this Act, quarterly thereafter until the date on which the Director implements the means required under paragraph (3), and annually thereafter, the Director shall brief the appropriate congressional committees on the implementation of this subsection.</DELETED>

<DELETED> (6) Sunset.--This subsection shall cease to have force or effect on the date that is 10 years after the date of enactment of this Act.</DELETED>

SECTION 1. SHORT TITLE.

This Act may be cited as the ``Government Ownership and Oversight of Data in Artificial Intelligence Act of 2021" or the ``GOOD AI Act of 2021".

SEC. 2. PRINCIPLES AND POLICIES FOR USE OF ARTIFICIAL INTELLIGENCE IN GOVERNMENT.

(a) Definitions.--In this Act:

(1) Agency.--The term ``agency" has the meaning given the term in section 3502 of title 44, United States Code.

(2) Appropriate congressional committees.--The term ``appropriate congressional committees" means--

(A) the Committee on Homeland Security and Governmental Affairs of the Senate; and

(B) the Committee on Oversight and Reform of the House of Representatives.

(3) Artificial intelligence.--The term ``artificial intelligence" has the meaning given the term in section 238(g) of the John S. McCain National Defense Authorization Act for Fiscal Year 2019 (10 U.S.C. 2358 note).

(4) Artificial intelligence system.--The term ``artificial intelligence system"--

(A) means any data system, software, application, tool, or utility that operates in whole or in part using dynamic or static machine learning algorithms or other forms of artificial intelligence, including a data system, software, application, tool, or utility--

(i) that is established primarily for the purpose of researching, developing, or implementing artificial intelligence technology; and

(ii) for which the artificial intelligence

capability is integrated into another system or agency business process, operational activity, or technology system; and

(B) does not include any common or commercial product within which artificial intelligence is embedded, such as a word processor or map navigation system.

(5) Director.--The term "Director" means the Director of the Office of Management and Budget.

(b) Guidance for Agency Use of Artificial Intelligence.--

(1) In general.--In developing an update under section 104(d) of the AI in Government Act of 2020 (40 U.S.C. 11301 note) to the memorandum issued under subsection (a) of that section, the Director shall consider--

(A) the considerations and recommended practices identified by the National Security Commission on Artificial Intelligence in the report entitled "Key Considerations for Responsible Development and Fielding of AI", as updated in April 2021;

(B) the principles articulated in Executive Order 13960 (85 Fed. Reg. 78939; relating to promoting the use of trustworthy artificial intelligence in the Federal Government); and

(C) the input of--

(i) the Privacy and Civil Liberties Oversight Board;

(ii) relevant interagency councils, such as the Federal Privacy Council, the Chief Information Officers Council, and the Chief Data Officers Council;

(iii) other governmental and nongovernmental privacy, civil rights, and civil liberties experts; and

(iv) any other individual or entity the Director determines appropriate.

(2) Sunset.--This subsection shall cease to have force or effect on the date that is 4 years after the date of enactment of this Act.

(c) Artificial Intelligence Hygiene and Protection of Government Information, Privacy, Civil Rights, and Civil Liberties.--

(1) Establishment.--Not later than 45 days after the date of enactment of this Act, the Director shall establish a working group to be known as the "Artificial Intelligence Hygiene Working Group".

(2) Membership.--The Director shall appoint members to the

Artificial Intelligence Hygiene Working Group from among members of appropriate interagency councils.

(3) Implementation.--Not later than 1 year after the date of enactment of this Act, the Director, in consultation with the Artificial Intelligence Hygiene Working Group, shall implement a means by which to--

(A) ensure that contracts for the acquisition of artificial intelligence and artificial intelligence systems--

(i) align with the memorandum issued, and periodically updated, by the Director under subsections (a) and (d), respectively, of section 104 of the AI in Government Act of 2020 (40 U.S.C. 11301 note);

(ii) address the protection of privacy, civil rights, and civil liberties;

(iii) address the ownership and security of data and other information created, used, processed, stored, maintained, disseminated, disclosed, or disposed of by a contractor or subcontractor on behalf of the Federal Government; and

(iv) address requirements for securing the training data, algorithms, and other components of any artificial intelligence system against--

(I) misuse;

(II) unauthorized alteration;

(III) degradation; or

(IV) being rendered inoperable; and

(B) address any other issue or concern the Director determines relevant to ensure--

(i) the appropriate use of artificial intelligence and artificial intelligence systems; and

(ii) the protection of privacy, Federal Government data, and other information of the Federal Government.

(4) Approaches.--In carrying out paragraph (3), the Director may use 1 or more approach and tailor requirements based on risk or any other factor determined relevant by the Director and the Artificial Intelligence Hygiene Working Group.

(5) Updates.--On a continuous basis, not later than 2 years after the date of enactment of this Act, and not less frequently than once every 2 years thereafter, the Director shall update the means implemented under paragraph (3).

(6) Briefing.--Not later than 90 days after the date of enactment of this Act, quarterly thereafter until the date on which the Director implements the means required under paragraph (3), and annually thereafter, the Director shall brief the appropriate congressional committees on the implementation of this subsection.

(7) Sunset.--This subsection shall cease to have force or effect on the date that is 10 years after the date of enactment of this Act.

Calendar No. 283

117th CONGRESS

2d Session

S. 3035

[Report No. 117-82]

A BILL

To establish the Artificial Intelligence Hygiene Working Group, and for other purposes.

February 28, 2022

Reported with an amendment

EVIDENCE-THIS WAS RECENTLY JUST ADDED TO S. 3035 AND THEY PROBABLY LEFT IT BLANK INTENTIONALLY FOR THE MOMENT!

10 USC 2358: Renumbered §4001

Text contains those laws in effect on September 7, 2023

From Title 10-ARMED FORCES
Subtitle A-General Military Law
PART IV-SERVICE, SUPPLY, AND PROPERTY
CHAPTER 139-REPEALED
[§2358. Renumbered §4001]

EVIDENCE

40 USC 11301: Responsibility of Director

Text contains those laws in effect on September 7, 2023

From Title 40-PUBLIC BUILDINGS, PROPERTY, AND WORKS

SUBTITLE III-INFORMATION TECHNOLOGY MANAGEMENT

CHAPTER 113-RESPONSIBILITY FOR ACQUISITIONS OF INFORMATION TECHNOLOGY

SUBCHAPTER I-DIRECTOR OF OFFICE OF MANAGEMENT AND BUDGET

Jump To:

Source Credit

Miscellaneous

Executive Documents

§11301. Responsibility of Director

In fulfilling the responsibility to administer the functions assigned under chapter 35 of title 44, the Director of the Office of Management and Budget shall comply with this chapter with respect to the specific matters covered by this chapter.

(Pub. L. 107–217, Aug. 21, 2002, 116 Stat. 1237 .)

Historical and Revision Notes

Revised

Section

Source (U.S. Code) Source (Statutes at Large)

11301 40:1411. Pub. L. 104–106, div. E, title LI, §5111, Feb. 10, 1996, 110 Stat. 680 .

Statutory Notes and Related Subsidiaries

Advancing American Artificial Intelligence

Pub. L. 117–263, div. G, title LXXII, subtitle B, Dec. 23, 2022, 136 Stat. 3668 , provided that:

"SEC. 7221. SHORT TITLE.

"This subtitle may be cited as the 'Advancing American AI Act'.

"SEC. 7222. PURPOSES.

"The purposes of this subtitle are to-

"(1) encourage agency artificial intelligence-related programs and initiatives that enhance the competitiveness of the United States and foster an approach to artificial intelligence that builds on the strengths of the United States in innovation and entrepreneurialism;

"(2) enhance the ability of the Federal Government to translate research advances into artificial intelligence applications to modernize systems and assist agency leaders in fulfilling their missions;

"(3) promote adoption of modernized business practices and advanced technologies across the Federal Government that align with the values of the United States, including the protection of privacy, civil rights, and civil liberties; and

"(4) test and harness applied artificial intelligence to enhance mission effectiveness, agency program integrity, and business practice efficiency.

"SEC. 7223. DEFINITIONS.

"In this subtitle:

"(1) Agency.-The term 'agency' has the meaning given the term in section 3502 of title 44, United States Code.

"(2) Appropriate congressional committees.-The term 'appropriate congressional committees' means-

"(A) the Committee on Homeland Security and Governmental Affairs of the Senate;

"(B) the Committee on Oversight and Reform of the House of Representatives; and

"(C) the Committee on Homeland Security of the House of Representatives.

"(3) Artificial intelligence.-The term 'artificial intelligence' has the meaning given the term in section 238(g) of the John S. McCain National Defense Authorization Act for Fiscal Year 2019 (10 U.S.C. 2358 note).

"(4) Artificial intelligence system.-The term 'artificial intelligence system'-

"(A) means any data system, software, application, tool, or utility that operates in whole

or in part using dynamic or static machine learning algorithms or other forms of artificial intelligence, whether-

"(i) the data system, software, application, tool, or utility is established primarily for the purpose of researching, developing, or implementing artificial intelligence technology; or

"(ii) artificial intelligence capability is integrated into another system or agency business process, operational activity, or technology system; and

"(B) does not include any common commercial product within which artificial intelligence is embedded, such as a word processor or map navigation system.

"(5) Department.-The term 'Department' means the Department of Homeland Security.

"(6) Director.-The term 'Director' means the Director of the Office of Management and Budget.

"SEC. 7224. PRINCIPLES AND POLICIES FOR USE OF ARTIFICIAL INTELLIGENCE IN GOVERNMENT.

"(a) Guidance.-The Director shall, when developing the guidance required under section 104(a) of the AI in Government Act of 2020 (title I of division U of Public Law 116–260) [see note below], consider-

"(1) the considerations and recommended practices identified by the National Security Commission on Artificial Intelligence in the report entitled 'Key Considerations for the Responsible Development and Fielding of AI', as updated in April 2021;

"(2) the principles articulated in Executive Order 13960 (85 Fed. Reg. 78939 [40 U.S.C. 11301 note]; relating to promoting the use of trustworthy artificial intelligence in Government); and

"(3) the input of-

"(A) the Administrator of General Services;

"(B) relevant interagency councils, such as the Federal Privacy Council, the Chief Financial Officers Council, the Chief Information Officers Council, and the Chief Data Officers Council;

"(C) other governmental and nongovernmental privacy, civil rights, and civil liberties experts;

"(D) academia;

"(E) industry technology and data science experts; and

"(F) any other individual or entity the Director determines to be appropriate.

"(b) Department Policies and Processes for Procurement and Use of Artificial Intelligence-enabled Systems.-Not later than 180 days after the date of enactment of this Act [Dec. 23, 2022]-

"(1) the Secretary of Homeland Security, with the participation of the Chief Procurement Officer, the Chief Information Officer, the Chief Privacy Officer, and the Officer for Civil Rights and Civil Liberties of the Department and any other person determined to be relevant by the Secretary of Homeland Security, shall issue policies and procedures for the Department related to-

"(A) the acquisition and use of artificial intelligence; and

"(B) considerations for the risks and impacts related to artificial intelligence-enabled systems, including associated data of machine learning systems, to ensure that full consideration is given to-

"(i) the privacy, civil rights, and civil liberties impacts of artificial intelligence-enabled systems; and

"(ii) security against misuse, degradation, or rendering inoperable of artificial intelligence-enabled systems; and

"(2) the Chief Privacy Officer and the Officer for Civil Rights and Civil Liberties of the Department shall report to Congress on any additional staffing or funding resources that may be required to carry out the requirements of this subsection.

"(c) Inspector General.-Not later than 180 days after the date of enactment of this Act, the Inspector General of the Department shall identify any training and investments needed to enable employees of the Office of the Inspector General to continually advance their understanding of-

"(1) artificial intelligence systems;

"(2) best practices for governance, oversight, and audits of the use of artificial intelligence systems; and

"(3) how the Office of the Inspector General is using artificial intelligence to enhance audit and investigative capabilities, including actions to-

"(A) ensure the integrity of audit and investigative results; and

"(B) guard against bias in the selection and conduct of audits and investigations.

"(d) Artificial Intelligence Hygiene and Protection of Government Information, Privacy, Civil Rights, and Civil Liberties.-

"(1) Establishment.-Not later than 1 year after the date of enactment of this Act, the Director, in consultation with a working group consisting of members selected by the Director from appropriate interagency councils, shall develop an initial means by which to-

"(A) ensure that contracts for the acquisition of an artificial intelligence system or service-

"(i) align with the guidance issued to the head of each agency under section 104(a) of the AI in Government Act of 2020 (title I of division U of Public Law 116-260);

"(ii) address protection of privacy, civil rights, and civil liberties;

"(iii) address the ownership and security of data and other information created, used, processed, stored, maintained, disseminated, disclosed, or disposed of by a contractor or subcontractor on behalf of the Federal Government; and

"(iv) include considerations for securing the training data, algorithms, and other components of any artificial intelligence system against misuse, unauthorized alteration, degradation, or rendering inoperable; and

"(B) address any other issue or concern determined to be relevant by the Director to ensure appropriate use and protection of privacy and Government data and other information.

"(2) Consultation.-In developing the considerations under paragraph (1)(A)(iv), the Director shall consult with the Secretary of Homeland Security, the Secretary of Energy, the Director of the National Institute of Standards and Technology, and the Director of National Intelligence.

"(3) Review.-The Director-

"(A) should continuously update the means developed under paragraph (1); and

"(B) not later than 2 years after the date of enactment of this Act and not less frequently

than every 2 years thereafter, shall update the means developed under paragraph (1).

"(4) Briefing.-The Director shall brief the appropriate congressional committees-

"(A) not later than 90 days after the date of enactment of this Act and thereafter on a quarterly basis until the Director first implements the means developed under paragraph (1); and

"(B) annually thereafter on the implementation of this subsection.

"(5) Sunset.-This subsection shall cease to be effective on the date that is 5 years after the date of enactment of this Act.

"SEC. 7225. AGENCY INVENTORIES AND ARTIFICIAL INTELLIGENCE USE CASES.

"(a) Inventory.-Not later than 60 days after the date of enactment of this Act [Dec. 23, 2022], and continuously thereafter for a period of 5 years, the Director, in consultation with the Chief Information Officers Council, the Chief Data Officers Council, and other interagency bodies as determined to be appropriate by the Director, shall require the head of each agency to-

"(1) prepare and maintain an inventory of the artificial intelligence use cases of the agency, including current and planned uses;

"(2) share agency inventories with other agencies, to the extent practicable and consistent with applicable law and policy, including those concerning protection of privacy and of sensitive law enforcement, national security, and other protected information; and

"(3) make agency inventories available to the public, in a manner determined by the Director, and to the extent practicable and in accordance with applicable law and policy, including those concerning the protection of privacy and of sensitive law enforcement, national security, and other protected information.

"(b) Central Inventory.-The Director is encouraged to designate a host entity and ensure the creation and maintenance of an online public directory to-

"(1) make agency artificial intelligence use case information available to the public and those wishing to do business with the Federal Government; and

"(2) identify common use cases across agencies.

"(c) Sharing.-The sharing of agency inventories described in subsection (a)(2) may be coordinated through the Chief Information Officers Council, the Chief Data Officers

Council, the Chief Financial Officers Council, the Chief Acquisition Officers Council, or other interagency bodies to improve interagency coordination and information sharing for common use cases.

"(d) Department of Defense.-Nothing in this section shall apply to the Department of Defense.

"SEC. 7226. RAPID PILOT, DEPLOYMENT AND SCALE OF APPLIED ARTIFICIAL INTELLIGENCE CAPABILITIES TO DEMONSTRATE MODERNIZATION ACTIVITIES RELATED TO USE CASES.

"(a) Identification of Use Cases.-Not later than 270 days after the date of enactment of this Act [Dec. 23, 2022], the Director, in consultation with the Chief Information Officers Council, the Chief Data Officers Council, the Chief Financial Officers Council, and other interagency bodies as determined to be appropriate by the Director, shall identify 4 new use cases for the application of artificial intelligence-enabled systems to support interagency or intra-agency modernization initiatives that require linking multiple siloed internal and external data sources, consistent with applicable laws and policies, including those relating to the protection of privacy and of sensitive law enforcement, national security, and other protected information.

"(b) Pilot Program.-

"(1) Purposes.-The purposes of the pilot program under this subsection include-

"(A) to enable agencies to operate across organizational boundaries, coordinating between existing established programs and silos to improve delivery of the agency mission;

"(B) to demonstrate the circumstances under which artificial intelligence can be used to modernize or assist in modernizing legacy agency systems; and

"(C) to leverage commercially available artificial intelligence technologies that-

"(i) operate in secure cloud environments that can deploy rapidly without the need to replace existing systems; and

"(ii) do not require extensive staff or training to build.

"(2) Deployment and pilot.-Not later than 1 year after the date of enactment of this Act, the Director, in coordination with the heads of relevant agencies and Federal entities, including the Administrator of General Services, the Bureau of Fiscal Service of the Department of the Treasury, the Council of the Inspectors General on Integrity and Efficiency, and the Pandemic Response Accountability Committee, and other officials as

the Director determines to be appropriate, shall ensure the initiation of the piloting of the 4 new artificial intelligence use case applications identified under subsection (a), leveraging commercially available technologies and systems to demonstrate scalable artificial intelligence-enabled capabilities to support the use cases identified under subsection (a).

"(3) Risk evaluation and mitigation plan.-In carrying out paragraph (2), the Director shall require the heads of agencies to-

"(A) evaluate risks in utilizing artificial intelligence systems; and

"(B) develop a risk mitigation plan to address those risks, including consideration of-

"(i) the artificial intelligence system not performing as expected or as designed;

"(ii) the quality and relevancy of the data resources used in the training of the algorithms used in an artificial intelligence system;

"(iii) the processes for training and testing, evaluating, validating, and modifying an artificial intelligence system; and

"(iv) the vulnerability of a utilized artificial intelligence system to unauthorized manipulation or misuse, including the use of data resources that substantially differ from the training data.

"(4) Prioritization.-In carrying out paragraph (2), the Director shall prioritize modernization projects that-

"(A) would benefit from commercially available privacy-preserving techniques, such as use of differential privacy, federated learning, and secure multiparty computing; and

"(B) otherwise take into account considerations of civil rights and civil liberties.

"(5) Privacy protections.-In carrying out paragraph (2), the Director shall require the heads of agencies to use privacy-preserving techniques when feasible, such as differential privacy, federated learning, and secure multiparty computing, to mitigate any risks to individual privacy or national security created by a project or data linkage.

"(6) Use case modernization application areas.-Use case modernization application areas described in paragraph (2) shall include not less than 1 from each of the following categories:

"(A) Applied artificial intelligence to drive agency productivity efficiencies in predictive

supply chain and logistics, such as-

"(i) predictive food demand and optimized supply;

"(ii) predictive medical supplies and equipment demand and optimized supply; or

"(iii) predictive logistics to accelerate disaster preparedness, response, and recovery.

"(B) Applied artificial intelligence to accelerate agency investment return and address mission-oriented challenges, such as-

"(i) applied artificial intelligence portfolio management for agencies;

"(ii) workforce development and upskilling;

"(iii) redundant and laborious analyses;

"(iv) determining compliance with Government requirements, such as with Federal financial management and grants management, including implementation of chapter 64 of subtitle V of title 31, United States Code;

"(v) addressing fraud, waste, and abuse in agency programs and mitigating improper payments; or

"(vi) outcomes measurement to measure economic and social benefits.

"(7) Requirements.-Not later than 3 years after the date of enactment of this Act, the Director, in coordination with the heads of relevant agencies and other officials as the Director determines to be appropriate, shall establish an artificial intelligence capability within each of the 4 use case pilots under this subsection that-

"(A) solves data access and usability issues with automated technology and eliminates or minimizes the need for manual data cleansing and harmonization efforts;

"(B) continuously and automatically ingests data and updates domain models in near real-time to help identify new patterns and predict trends, to the extent possible, to help agency personnel to make better decisions and take faster actions;

"(C) organizes data for meaningful data visualization and analysis so the Government has predictive transparency for situational awareness to improve use case outcomes;

"(D) is rapidly configurable to support multiple applications and automatically adapts to

dynamic conditions and evolving use case requirements, to the extent possible;

"(E) enables knowledge transfer and collaboration across agencies; and

"(F) preserves intellectual property rights to the data and output for benefit of the Federal Government and agencies and protects sensitive personally identifiable information.

"(c) Briefing.-Not earlier than 270 days but not later than 1 year after the date of enactment of this Act, and annually thereafter for 4 years, the Director shall brief the appropriate congressional committees on the activities carried out under this section and results of those activities.

"(d) Sunset.-The section shall cease to be effective on the date that is 5 years after the date of enactment of this Act.

"SEC. 7227. ENABLING ENTREPRENEURS AND AGENCY MISSIONS.

"(a) Innovative Commercial Items.-[Amended section 880 of the National Defense Authorization Act for Fiscal Year 2017 (41 U.S.C. 3301 note).]

"(b) DHS Other Transaction Authority.-[Amended section 391 of Title 6, Domestic Security.]

"(c) Commercial Off the Shelf Supply Chain Risk Management Tools.-

"(1) In general.-The General Services Administration is encouraged to pilot commercial off the shelf supply chain risk management tools to improve the ability of the Federal Government to characterize, monitor, predict, and respond to specific supply chain threats and vulnerabilities that could inhibit future Federal acquisition operations.

"(2) Consultation.-In carrying out this subsection, the General Services Administration shall consult with the Federal Acquisition Security Council established under section 1322 of title 41, United States Code.

"SEC. 7228. INTELLIGENCE COMMUNITY EXCEPTION.

"Nothing in this subtitle shall apply to any element of the intelligence community, as defined in section 3 of the National Security Act of 1947 (50 U.S.C. 3003)."

AI in Government

Pub. L. 116-260, div. U, title I, Dec. 27, 2020, 134 Stat. 2286 , provided that:

"SEC. 101. SHORT TITLE.

"This title may be cited as the 'AI in Government Act of 2020'.

"SEC. 102. DEFINITIONS.

"In this Act [probably means "this title"]-

"(1) the term 'Administrator' means the Administrator of General Services;

"(2) the term 'agency' has the meaning given the term in section 3502 of title 44, United States Code;

"(3) the term 'AI CoE' means the AI Center of Excellence described in section 103;

"(4) the term 'artificial intelligence' has the meaning given the term in section 238(g) of the John S. McCain National Defense Authorization Act for Fiscal Year 2019 (10 U.S.C. 2358 note);

"(5) the term 'Director' means the Director of the Office of Management and Budget;

"(6) the term 'institution of higher education' has the meaning given the term in section 101 of the Higher Education Act of 1965 (20 U.S.C. 1001); and

"(7) the term 'nonprofit organization' means an organization described in section 501(c)(3) of [sic] the Internal Revenue Code of 1986 [26 U.S.C. 501(c)(3)] and exempt from taxation under section 501(a) of that Code [26 U.S.C. 501(a)].

"SEC. 103. AI CENTER OF EXCELLENCE.

"(a) In General.-There is created within the General Services Administration a program to be known as the 'AI Center of Excellence', which shall-

"(1) facilitate the adoption of artificial intelligence technologies in the Federal Government;

"(2) improve cohesion and competency in the adoption and use of artificial intelligence within the Federal Government; and

"(3) carry out paragraphs (1) and (2) for the purposes of benefitting the public and enhancing the productivity and efficiency of Federal Government operations.

"(b) Duties.-The duties of the AI CoE shall include-

"(1) regularly convening individuals from agencies, industry, Federal laboratories, nonprofit organizations, institutions of higher education, and other entities to discuss recent developments in artificial intelligence, including the dissemination of information regarding programs, pilots, and other initiatives at agencies, as well as recent trends and

relevant information on the understanding, adoption, and use of artificial intelligence;

"(2) collecting, aggregating, and publishing on a publicly available website information regarding programs, pilots, and other initiatives led by other agencies and any other information determined appropriate by the Administrator;

"(3) advising the Administrator, the Director, and agencies on the acquisition and use of artificial intelligence through technical insight and expertise, as needed;

"(4) assist agencies in applying Federal policies regarding the management and use of data in applications of artificial intelligence;

"(5) consulting with agencies, including the Department of Defense, the Department of Commerce, the Department of Energy, the Department of Homeland Security, the Office of Management and Budget, the Office of the Director of National Intelligence, and the National Science Foundation, that operate programs, create standards and guidelines, or otherwise fund internal projects or coordinate between the public and private sectors relating to artificial intelligence;

"(6) advising the Director on developing policy related to the use of artificial intelligence by agencies; and

"(7) advising the Director of the Office of Science and Technology Policy on developing policy related to research and national investment in artificial intelligence.

"(c) Staff.-

"(1) In general.-The Administrator shall provide necessary staff, resources, and administrative support for the AI CoE.

"(2) Shared staff.-To the maximum extent practicable, the Administrator shall meet the requirements described under paragraph (1) by using staff of the General Services Administration, including those from other agency centers of excellence, and detailees, on a reimbursable or nonreimbursable basis, from other agencies.

"(3) Fellows.-The Administrator may, to the maximum extent practicable, appoint fellows to participate in the AI CoE from nonprofit organizations, think tanks, institutions of higher education, and industry.

"(d) Sunset.-This section shall cease to be effective on the date that is 5 years after the date of enactment of this Act [Dec. 27, 2020].

"SEC. 104. GUIDANCE FOR AGENCY USE OF ARTIFICIAL INTELLIGENCE.

"(a) Guidance.-Not later than 270 days after the date of enactment of this Act [Dec. 27, 2020], the Director, in coordination with the Director of the Office of Science and Technology Policy in consultation with the Administrator and any other relevant agencies and key stakeholders as determined by the Director, shall issue a memorandum to the head of each agency that shall-

"(1) inform the development of policies regarding Federal acquisition and use by agencies regarding technologies that are empowered or enabled by artificial intelligence, including an identification of the responsibilities of agency officials managing the use of such technology;

"(2) recommend approaches to remove barriers for use by agencies of artificial intelligence technologies in order to promote the innovative application of those technologies while protecting civil liberties, civil rights, and economic and national security;

"(3) identify best practices for identifying, assessing, and mitigating any discriminatory impact or bias on the basis of any classification protected under Federal nondiscrimination laws, or any unintended consequence of the use of artificial intelligence, including policies to identify data used to train artificial intelligence algorithms as well as the data analyzed by artificial intelligence used by the agencies; and

"(4) provide a template of the required contents of the agency plans described in subsection (c).

"(b) Public Comment.-To help ensure public trust in the applications of artificial intelligence technologies, the Director shall issue a draft version of the memorandum required under subsection (a) for public comment not later than 180 days after [the] date of enactment of this Act.

"(c) Plans.-Not later than 180 days after the date on which the Director issues the memorandum required under subsection (a) or an update to the memorandum required under subsection (d), the head of each agency shall submit to the Director and post on a publicly available page on the website of the agency-

"(1) a plan to achieve consistency with the memorandum; or

"(2) a written determination that the agency does not use and does not anticipate using artificial intelligence.

"(d) Updates.-Not later than 2 years after the date on which the Director issues the memorandum required under subsection (a), and every 2 years thereafter for 10 years, the Director shall issue updates to the memorandum.

"SEC. 105. UPDATE OF OCCUPATIONAL SERIES FOR ARTIFICIAL INTELLIGENCE.

"(a) In General.-Not later than 18 months after the date of enactment of this Act [Dec. 27, 2020], and in accordance with chapter 51 of title 5, United States Code, the Director of the Office of Personnel Management shall-

"(1) identify key skills and competencies needed for positions related to artificial intelligence;

"(2) establish an occupational series, or update and improve an existing occupational job series, to include positions the primary duties of which relate to artificial intelligence;

"(3) to the extent appropriate, establish an estimate of the number of Federal employees in positions related to artificial intelligence, by each agency; and

"(4) using the estimate established in paragraph (3), prepare a 2-year and 5-year forecast of the number of Federal employees in positions related to artificial intelligence that each agency will need to employ.

"(b) Plan.-Not later than 120 days after the date of enactment of this Act, the Director of the Office of Personnel Management shall submit to the Committee on Homeland Security and Governmental Affairs of the Senate and the Committee on Oversight and Reform of the House of Representatives a comprehensive plan with a timeline to complete requirements described in subsection (a)."

GSA Modernization Centers of Excellence Program

Pub. L. 116-194, §2, Dec. 3, 2020, 134 Stat. 981 , provided that:

"(a) Definitions.-In this section:

"(1) Cloud computing.-The term 'cloud computing' has the meaning given the term in section 1076 of the National Defense Authorization Act for Fiscal Year 2018 [Pub. L. 115-91] (40 U.S.C. 11301 note) [set out below].

"(2) Executive agency.-The term 'executive agency' has the meaning given the term 'Executive agency' in section 105 of title 5, United States Code.

"(3) Program.-The term 'Program' means the Information Technology Modernization Centers of Excellence Program established under subsection (b).

"(b) Establishment.-The Administrator of General Services shall establish a program to be known as the Information Technology Modernization Centers of Excellence Program to facilitate the adoption of modern technology by executive agencies on a reimbursable

basis.

"(c) Responsibilities.-The Program shall have the following responsibilities:

"(1) To encourage the modernization of information technology used by an executive agency and how a customer interacts with an executive agency.

"(2) To improve cooperation between commercial and executive agency information technology sectors.

"(3) To the extent practicable, encourage the adoption of commercial items in accordance with section 3307 of title 41, United States Code.

"(4) Upon request by the executive agency, to assist executive agencies with planning and adoption of technology in focus areas designated by the Administrator, which may include the following:

"(A) A commercial cloud computing system that includes-

"(i) end-to-end migration planning and an assessment of progress towards modernization; and

"(ii) a cybersecurity and governance framework that promotes industry and government risk management best practice approaches, prioritizing efforts based on risk, impact, and consequences.

"(B) Tools to help an individual receive support from and communicate with an executive agency.

"(C) Contact centers and other related customer supports.

"(D) Efficient use of data management, analysis, and reporting.

"(E) The optimization of infrastructure, including for data centers, and the reduction of operating costs.

"(F) Artificial intelligence.

"(5) To share best practices and expertise with executive agencies.

"(6) Other responsibilities the Administrator may identify.

"(d) Coordination.-The Administrator shall coordinate with the Secretary of Homeland Security in establishing the Program to ensure that the technology, tools, and frameworks facilitated for executive agencies by the Program provide sufficient cybersecurity and maintain the integrity, confidentiality, and availability of Federal information.

"(e) Program Reporting.-Not later than 1 year after the date of enactment of this Act [Dec. 3, 2020], and every year thereafter, the Administrator shall submit to the Committee on Homeland Security and Governmental Affairs of the Senate and the Committee on Oversight and Reform of the House of Representatives a report on the Program, which shall include the following:

"(1) A description of the reimbursable agreements, statements of work, and associated project schedules and deliverables for the Program.

"(2) Details on the total amount of the reimbursable agreements.

"(3) Any additional information the Administrator determines necessary.

"(f) Sunset.-This Act shall cease to have effect on the date that is 7 years after the date of enactment of this Act.

"(g) Rule of Construction.-Nothing in this Act shall be construed to impair or otherwise affect the authority delegated by law to an executive agency or the head of an executive agency."

Modernizing Government Technology

Pub. L. 115-91, div. A, title X, subtitle G, Dec. 12, 2017, 131 Stat. 1586 , provided that:

"SEC. 1076. DEFINITIONS.

"In this subtitle:

"(1) Administrator.-The term 'Administrator' means the Administrator of General Services.

"(2) Board.-The term 'Board' means the Technology Modernization Board established under section 1094(c)(1).

"(3) Cloud computing.-The term 'cloud computing' has the meaning given the term by the National Institute of Standards and Technology in NIST Special Publication 800-145 and any amendatory or superseding document thereto.

"(4) Director.-The term 'Director' means the Director of the Office of Management and

Budget.

"(5) Fund.-The term 'Fund' means the Technology Modernization Fund established under section 1094(b)(1) [probably should be "1078(b)(1)"].

"(6) Information technology.-The term 'information technology' has the meaning given the term in section 3502 of title 44, United States Code.

"(7) IT working capital fund.-The term 'IT working capital fund' means an information technology system modernization and working capital fund established under section 1093(b)(1) [probably should be "1077(b)(1)"].

"(8) Legacy information technology system.-The term 'legacy information technology system' means an outdated or obsolete system of information technology.

"SEC. 1077. ESTABLISHMENT OF AGENCY INFORMATION TECHNOLOGY SYSTEMS MODERNIZATION AND WORKING CAPITAL FUNDS.

"(a) Definition.-In this section, the term 'covered agency' means each agency listed in section 901(b) of title 31, United States Code.

"(b) Information Technology System Modernization and Working Capital Funds.-

"(1) Establishment.-The head of a covered agency may establish within the covered agency an information technology system modernization and working capital fund for necessary expenses described in paragraph (3).

"(2) Source of funds.-The following amounts may be deposited into an IT working capital fund:

"(A) Reprogramming and transfer of funds made available in appropriations Acts enacted after the date of enactment of this Act [Dec. 12, 2017], including the transfer of any funds for the operation and maintenance of legacy information technology systems, in compliance with any applicable reprogramming law or guidelines of the Committees on Appropriations of the Senate and the House of Representatives or transfer authority specifically provided in appropriations law.

"(B) Amounts made available to the IT working capital fund through discretionary appropriations made available after the date of enactment of this Act.

"(3) Use of funds.-An IT working capital fund established under paragraph (1) may only be used-

"(A) to improve, retire, or replace existing information technology systems in the covered

agency to enhance cybersecurity and to improve efficiency and effectiveness across the life of a given workload, procured using full and open competition among all commercial items to the greatest extent practicable;

"(B) to transition legacy information technology systems at the covered agency to commercial cloud computing and other innovative commercial platforms and technologies, including those serving more than 1 covered agency with common requirements;

"(C) to assist and support covered agency efforts to provide adequate, risk-based, and cost-effective information technology capabilities that address evolving threats to information security;

"(D) to reimburse funds transferred to the covered agency from the Fund with the approval of the Chief Information Officer, in consultation with the Chief Financial Officer, of the covered agency; and

"(E) for a program, project, or activity or to increase funds for any program, project, or activity that has not been denied or restricted by Congress.

"(4) Existing funds.-An IT working capital fund may not be used to supplant funds provided for the operation and maintenance of any system within an appropriation for the covered agency at the time of establishment of the IT working capital fund.

"(5) Prioritization of funds.-The head of each covered agency-

"(A) shall prioritize funds within the IT working capital fund of the covered agency to be used initially for cost savings activities approved by the Chief Information Officer of the covered agency; and

"(B) may reprogram and transfer any amounts saved as a direct result of the cost savings activities approved under clause (i) [probably should be "subparagraph (A)"] for deposit into the IT working capital fund of the covered agency, consistent with paragraph (2)(A).

"(6) Availability of funds.-

"(A) In general.-Any funds deposited into an IT working capital fund shall be available for obligation for the 3-year period beginning on the last day of the fiscal year in which the funds were deposited.

"(B) Transfer of unobligated amounts.-Any amounts in an IT working capital fund that are unobligated at the end of the 3-year period described in subparagraph (A) shall be

transferred to the general fund of the Treasury.

"(7) Agency cio responsibilities.-In evaluating projects to be funded by the IT working capital fund of a covered agency, the Chief Information Officer of the covered agency shall consider, to the extent applicable, guidance issued under section 1094(b)(1) [probably should be "1078(b)(1)"] to evaluate applications for funding from the Fund that include factors including a strong business case, technical design, consideration of commercial off-the-shelf products and services, procurement strategy (including adequate use of rapid, iterative software development practices), and program management.

"(c) Reporting Requirement.-

"(1) In general.-Not later than 1 year after the date of enactment of this Act, and every 6 months thereafter, the head of each covered agency shall submit to the Director, with respect to the IT working capital fund of the covered agency-

"(A) a list of each information technology investment funded, including the estimated cost and completion date for each investment; and

"(B) a summary by fiscal year of obligations, expenditures, and unused balances.

"(2) Public availability.-The Director shall make the information submitted under paragraph (1) publicly available on a website.

"SEC. 1078. ESTABLISHMENT OF TECHNOLOGY MODERNIZATION FUND AND BOARD.

"(a) Definition.-In this section, the term 'agency' has the meaning given the term in section 551 of title 5, United States Code.

"(b) Technology Modernization Fund.-

"(1) Establishment.-There is established in the Treasury a Technology Modernization Fund for technology-related activities, to improve information technology, to enhance cybersecurity across the Federal Government, and to be administered in accordance with guidance issued by the Director.

"(2) Administration of fund.-The Administrator, in consultation with the Chief Information Officers Council and with the approval of the Director, shall administer the Fund in accordance with this subsection.

"(3) Use of funds.-The Administrator shall, in accordance with recommendations from the Board, use amounts in the Fund-

"(A) to transfer such amounts, to remain available until expended, to the head of an agency for the acquisition of products and services, or the development of such products and services when more efficient and cost effective, to improve, retire, or replace existing Federal information technology systems to enhance cybersecurity and privacy and improve long-term efficiency and effectiveness;

"(B) to transfer such amounts, to remain available until expended, to the head of an agency for the operation and procurement of information technology products and services, or the development of such products and services when more efficient and cost effective, and acquisition vehicles for use by agencies to improve Governmentwide efficiency and cybersecurity in accordance with the requirements of the agencies;

"(C) to provide services or work performed in support of-

"(i) the activities described in subparagraph (A) or (B); and

"(ii) the Board and the Director in carrying out the responsibilities described in subsection (c)(2); and

"(D) to fund only programs, projects, or activities or to fund increases for any programs, projects, or activities that have not been denied or restricted by Congress.

"(4) Authorization of appropriations; credits; availability of funds.-

"(A) Authorization of appropriations.-There is authorized to be appropriated to the Fund \$250,000,000 for each of fiscal years 2018 and 2019.

"(B) Credits.-In addition to any funds otherwise appropriated, the Fund shall be credited with all reimbursements, advances, or refunds or recoveries relating to information technology or services provided for the purposes described in paragraph (3).

"(C) Availability of funds.-Amounts deposited, credited, or otherwise made available to the Fund shall be available until expended for the purposes described in paragraph (3).

"(5) Reimbursement.-

"(A) Reimbursement by agency.-

"(i) In general.-The head of an agency shall reimburse the Fund for any transfer made under subparagraph (A) or (B) of paragraph (3), including any services or work performed in support of the transfer under paragraph (3)(C), in accordance with the terms established in a written agreement described in paragraph (6).

"(ii) Reimbursement from subsequent appropriations.-Notwithstanding any other provision of law, an agency may make a reimbursement required under clause (i) from any appropriation made available after the date of enactment of this Act [Dec. 12, 2017] for information technology activities, consistent with any applicable reprogramming law or guidelines of the Committees on Appropriations of the Senate and the House of Representatives.

"(iii) Recording of obligation.-Notwithstanding section 1501 of title 31, United States Code, an obligation to make a payment under a written agreement described in paragraph (6) in a fiscal year after the date of enactment of this Act shall be recorded in the fiscal year in which the payment is due.

"(B) Prices fixed by administrator.-

"(i) In general.-The Administrator, in consultation with the Director, shall establish amounts to be paid by an agency under this paragraph and the terms of repayment for activities funded under paragraph (3), including any services or work performed in support of that development under paragraph (3)(C), at levels sufficient to ensure the solvency of the Fund, including operating expenses.

"(ii) Review and approval.-Before making any changes to the established amounts and terms of repayment, the Administrator shall conduct a review and obtain approval from the Director.

"(C) Failure to make timely reimbursement.-The Administrator may obtain reimbursement from an agency under this paragraph by the issuance of transfer and counterwarrants, or other lawful transfer documents, supported by itemized bills, if payment is not made by the agency during the 90-day period beginning after the expiration of a repayment period described in a written agreement described in paragraph (6).

"(6) Written agreement.-

"(A) In general.-Before the transfer of funds to an agency under subparagraphs (A) and (B) of paragraph (3), the Administrator, in consultation with the Director, and the head of the agency shall enter into a written agreement-

"(i) documenting the purpose for which the funds will be used and the terms of repayment, which may not exceed 5 years unless approved by the Director; and

"(ii) which shall be recorded as an obligation as provided in paragraph (5)(A).

"(B) Requirement for use of incremental funding, commercial products and services, and

rapid, iterative development practices.-The Administrator shall ensure-

"(i) for any funds transferred to an agency under paragraph (3)(A), in the absence of compelling circumstances documented by the Administrator at the time of transfer, that such funds shall be transferred only on an incremental basis, tied to metric-based development milestones achieved by the agency through the use of rapid, iterative, development processes; and

"(ii) that the use of commercial products and services are incorporated to the greatest extent practicable in activities funded under subparagraphs (A) and (B) of paragraph (3), and that the written agreement required under paragraph (6) documents this preference.

"(7) Reporting requirements.-

"(A) List of projects.-

"(i) In general.-Not later than 6 months after the date of enactment of this Act, the Director shall maintain a list of each project funded by the Fund, to be updated not less than quarterly, that includes a description of the project, project status (including any schedule delay and cost overruns), financial expenditure data related to the project, and the extent to which the project is using commercial products and services, including if applicable, a justification of why commercial products and services were not used and the associated development and integration costs of custom development.

"(ii) Public availability.-The list required under clause (i) shall be published on a public website in a manner that is, to the greatest extent possible, consistent with applicable law on the protection of classified information, sources, and methods.

"(B) Comptroller general reports.-Not later than 2 years after the date of enactment of this Act, and every 2 years thereafter, the Comptroller General of the United States shall submit to Congress and make publically available a report assessing-

"(i) the costs associated with establishing the Fund and maintaining the oversight structure associated with the Fund compared with the cost savings associated with the projects funded both annually and over the life of the acquired products and services by the Fund;

"(ii) the reliability of the cost savings estimated by agencies associated with projects funded by the Fund;

"(iii) whether agencies receiving transfers of funds from the Fund used full and open competition to acquire the custom development of information technology products or services; and

"(iv) the number of IT procurement, development, and modernization programs, offices, and entities in the Federal Government, including 18F and the United States Digital Services, the roles, responsibilities, and goals of those programs and entities, and the extent to which they duplicate work.

"(c) Technology Modernization Board.-

"(1) Establishment.-There is established a Technology Modernization Board to evaluate proposals submitted by agencies for funding authorized under the Fund.

"(2) Responsibilities.-The responsibilities of the Board are-

"(A) to provide input to the Director for the development of processes for agencies to submit modernization proposals to the Board and to establish the criteria by which those proposals are evaluated, which shall include-

"(i) addressing the greatest security, privacy, and operational risks;

"(ii) having the greatest Governmentwide impact; and

"(iii) having a high probability of success based on factors including a strong business case, technical design, consideration of commercial off-the-shelf products and services, procurement strategy (including adequate use of rapid, agile iterative software development practices), and program management;

"(B) to make recommendations to the Administrator to assist agencies in the further development and refinement of select submitted modernization proposals, based on an initial evaluation performed with the assistance of the Administrator;

"(C) to review and prioritize, with the assistance of the Administrator and the Director, modernization proposals based on criteria established pursuant to subparagraph (A);

"(D) to identify, with the assistance of the Administrator, opportunities to improve or replace multiple information technology systems with a smaller number of information technology services common to multiple agencies;

"(E) to recommend the funding of modernization projects, in accordance with the uses described in subsection (b)(3), to the Administrator;

"(F) to monitor, in consultation with the Administrator, progress and performance in executing approved projects and, if necessary, recommend the suspension or termination of funding for projects based on factors including the failure to meet the

terms of a written agreement described in subsection (b)(6); and

"(G) to monitor the operating costs of the Fund.

"(3) Membership.-The Board shall consist of 7 voting members.

"(4) Chair.-The Chair of the Board shall be the Administrator of the Office of Electronic Government.

"(5) Permanent members.-The permanent members of the Board shall be-

"(A) the Administrator of the Office of Electronic Government; and

"(B) a senior official from the General Services Administration having technical expertise in information technology development, appointed by the Administrator, with the approval of the Director.

"(6) Additional members of the board.-

"(A) Appointment.-The other members of the Board shall be-

"(i) 1 employee of the National Protection and Programs Directorate [now Cybersecurity and Infrastructure Security Agency] of the Department of Homeland Security, appointed by the Secretary of Homeland Security; and

"(ii) 4 employees of the Federal Government primarily having technical expertise in information technology development, financial management, cybersecurity and privacy, and acquisition, appointed by the Director.

"(B) Term.-Each member of the Board described in paragraph (A) shall serve a term of 1 year, which shall be renewable not more than 4 times at the discretion of the appointing Secretary or Director, as applicable.

"(7) Prohibition on compensation.-Members of the Board may not receive additional pay, allowances, or benefits by reason of their service on the Board.

"(8) Staff.-Upon request of the Chair of the Board, the Director and the Administrator may detail, on a reimbursable or nonreimbursable basis, any employee of the Federal Government to the Board to assist the Board in carrying out the functions of the Board.

"(d) Responsibilities of Administrator.-

"(1) In general.-In addition to the responsibilities described in subsection (b), the Administrator shall support the activities of the Board and provide technical support to, and, with the concurrence of the Director, oversight of, agencies that receive transfers from the Fund.

"(2) Responsibilities.-The responsibilities of the Administrator are-

"(A) to provide direct technical support in the form of personnel services or otherwise to agencies transferred amounts under subsection (b)(3)(A) and for products, services, and acquisition vehicles funded under subsection (b)(3)(B);

"(B) to assist the Board with the evaluation, prioritization, and development of agency modernization proposals.

"(C) to perform regular project oversight and monitoring of approved agency modernization projects, in consultation with the Board and the Director, to increase the likelihood of successful implementation and reduce waste; and

"(D) to provide the Director with information necessary to meet the requirements of subsection (b)(7).

"(e) Effective Date.-This section shall take effect on the date that is 90 days after the date of enactment of this Act.

"(f) Sunset.-

"(1) In general.-On and after the date that is 2 years after the date on which the Comptroller General of the United States issues the third report required under subsection (b)(7)(B), the Administrator may not award or transfer funds from the Fund for any project that is not already in progress as of such date.

"(2) Transfer of unobligated amounts.-Not later than 90 days after the date on which all projects that received an award from the Fund are completed, any amounts in the Fund shall be transferred to the general fund of the Treasury and shall be used for deficit reduction.

"(3) Termination of technology modernization board.-Not later than 90 days after the date on which all projects that received an award from the Fund are completed, the Technology Modernization Board and all the authorities of subsection (c) shall terminate."

Executive Documents

Ex. Ord. No. 13960. Promoting the Use of Trustworthy Artificial Intelligence in the Federal Government

Ex. Ord. No. 13960, Dec. 3, 2020, 85 F.R. 78939, provided:

By the authority vested in me as President by the Constitution and the laws of the United States of America, it is hereby ordered as follows:

Section 1. Purpose. Artificial intelligence (AI) promises to drive the growth of the United States economy and improve the quality of life of all Americans. In alignment with Executive Order 13859 of February 11, 2019 (Maintaining American Leadership in Artificial Intelligence) [42 U.S.C. 6601 note], executive departments and agencies (agencies) have recognized the power of AI to improve their operations, processes, and procedures; meet strategic goals; reduce costs; enhance oversight of the use of taxpayer funds; increase efficiency and mission effectiveness; improve quality of services; improve safety; train workforces; and support decision making by the Federal workforce, among other positive developments. Given the broad applicability of AI, nearly every agency and those served by those agencies can benefit from the appropriate use of AI.

Agencies are already leading the way in the use of AI by applying it to accelerate regulatory reform; review Federal solicitations for regulatory compliance; combat fraud, waste, and abuse committed against taxpayers; identify information security threats and assess trends in related illicit activities; enhance the security and interoperability of Federal Government information systems; facilitate review of large datasets; streamline processes for grant applications; model weather patterns; facilitate predictive maintenance; and much more.

Agencies are encouraged to continue to use AI, when appropriate, to benefit the American people. The ongoing adoption and acceptance of AI will depend significantly on public trust. Agencies must therefore design, develop, acquire, and use AI in a manner that fosters public trust and confidence while protecting privacy, civil rights, civil liberties, and American values, consistent with applicable law and the goals of Executive Order 13859.

Certain agencies have already adopted guidelines and principles for the use of AI for national security or defense purposes, such as the Department of Defense's Ethical Principles for Artificial Intelligence (February 24, 2020), and the Office of the Director of National Intelligence's Principles of Artificial Intelligence Ethics for the Intelligence Community (July 23, 2020) and its Artificial Intelligence Ethics Framework for the Intelligence Community (July 23, 2020). Such guidelines and principles ensure that the use of AI in those contexts will benefit the American people and be worthy of their trust.

Section 3 of this order establishes additional principles (Principles) for the use of AI in the Federal Government for purposes other than national security and defense, to

similarly ensure that such uses are consistent with our Nation's values and are beneficial to the public. This order further establishes a process for implementing these Principles through common policy guidance across agencies.

Sec. 2. Policy. (a) It is the policy of the United States to promote the innovation and use of AI, where appropriate, to improve Government operations and services in a manner that fosters public trust, builds confidence in AI, protects our Nation's values, and remains consistent with all applicable laws, including those related to privacy, civil rights, and civil liberties.

(b) It is the policy of the United States that responsible agencies, as defined in section 8 of this order, shall, when considering the design, development, acquisition, and use of AI in Government, be guided by the common set of Principles set forth in section 3 of this order, which are designed to foster public trust and confidence in the use of AI, protect our Nation's values, and ensure that the use of AI remains consistent with all applicable laws, including those related to privacy, civil rights, and civil liberties.

(c) It is the policy of the United States that the Principles for the use of AI in Government shall be governed by common policy guidance issued by the Office of Management and Budget (OMB) as outlined in section 4 of this order, consistent with applicable law.

Sec. 3. Principles for Use of AI in Government. When designing, developing, acquiring, and using AI in the Federal Government, agencies shall adhere to the following Principles:

(a) Lawful and respectful of our Nation's values. Agencies shall design, develop, acquire, and use AI in a manner that exhibits due respect for our Nation's values and is consistent with the Constitution and all other applicable laws and policies, including those addressing privacy, civil rights, and civil liberties.

(b) Purposeful and performance-driven. Agencies shall seek opportunities for designing, developing, acquiring, and using AI, where the benefits of doing so significantly outweigh the risks, and the risks can be assessed and managed.

(c) Accurate, reliable, and effective. Agencies shall ensure that their application of AI is consistent with the use cases for which that AI was trained, and such use is accurate, reliable, and effective.

(d) Safe, secure, and resilient. Agencies shall ensure the safety, security, and resiliency of their AI applications, including resilience when confronted with systematic vulnerabilities, adversarial manipulation, and other malicious exploitation.

(e) Understandable. Agencies shall ensure that the operations and outcomes of their AI applications are sufficiently understandable by subject matter experts, users, and

others, as appropriate.

(f) Responsible and traceable. Agencies shall ensure that human roles and responsibilities are clearly defined, understood, and appropriately assigned for the design, development, acquisition, and use of AI. Agencies shall ensure that AI is used in a manner consistent with these Principles and the purposes for which each use of AI is intended. The design, development, acquisition, and use of AI, as well as relevant inputs and outputs of particular AI applications, should be well documented and traceable, as appropriate and to the extent practicable.

(g) Regularly monitored. Agencies shall ensure that their AI applications are regularly tested against these Principles. Mechanisms should be maintained to supersede, disengage, or deactivate existing applications of AI that demonstrate performance or outcomes that are inconsistent with their intended use or this order.

(h) Transparent. Agencies shall be transparent in disclosing relevant information regarding their use of AI to appropriate stakeholders, including the Congress and the public, to the extent practicable and in accordance with applicable laws and policies, including with respect to the protection of privacy and of sensitive law enforcement, national security, and other protected information.

(i) Accountable. Agencies shall be accountable for implementing and enforcing appropriate safeguards for the proper use and functioning of their applications of AI, and shall monitor, audit, and document compliance with those safeguards. Agencies shall provide appropriate training to all agency personnel responsible for the design, development, acquisition, and use of AI.

Sec. 4. Implementation of Principles. (a) Existing OMB policies currently address many aspects of information and information technology design, development, acquisition, and use that apply, but are not unique, to AI. To the extent they are consistent with the Principles set forth in this order and applicable law, these existing policies shall continue to apply to relevant aspects of AI use in Government.

(b) Within 180 days of the date of this order [Dec. 3, 2020], the Director of OMB (Director), in coordination with key stakeholders identified by the Director, shall publicly post a roadmap for the policy guidance that OMB intends to create or revise to better support the use of AI, consistent with this order. This roadmap shall include, where appropriate, a schedule for engaging with the public and timelines for finalizing relevant policy guidance. In addressing novel aspects of the use of AI in Government, OMB shall consider updates to the breadth of its policy guidance, including OMB Circulars and Management Memoranda.

(c) Agencies shall continue to use voluntary consensus standards developed with industry participation, where available, when such use would not be inconsistent with

applicable law or otherwise impracticable. Such standards shall also be taken into consideration by OMB when revising or developing AI guidance.

Sec. 5. Agency Inventory of AI Use Cases. (a) Within 60 days of the date of this order, the Federal Chief Information Officers Council (CIO Council), in coordination with other interagency bodies as it deems appropriate, shall identify, provide guidance on, and make publicly available the criteria, format, and mechanisms for agency inventories of non-classified and non-sensitive use cases of AI by agencies.

(b) Within 180 days of the CIO Council's completion of the directive in section 5(a) of this order, and annually thereafter, each agency shall prepare an inventory of its non-classified and non-sensitive use cases of AI, within the scope defined by section 9 of this order, including current and planned uses, consistent with the agency's mission.

(c) As part of their respective inventories of AI use cases, agencies shall identify, review, and assess existing AI deployed and operating in support of agency missions for any inconsistencies with this order.

(i) Within 120 days of completing their respective inventories, agencies shall develop plans either to achieve consistency with this order for each AI application or to retire AI applications found to be developed or used in a manner that is not consistent with this order. These plans must be approved by the agency-designated responsible official(s), as described in section 8 of this order, within this same 120-day time period.

(ii) In coordination with the Agency Data Governance Body and relevant officials from agencies not represented within that body, agencies shall strive to implement the approved plans within 180 days of plan approval, subject to existing resource levels.

(d) Within 60 days of the completion of their respective inventories of use cases of AI, agencies shall share their inventories with other agencies, to the extent practicable and consistent with applicable law and policy, including those concerning protection of privacy and of sensitive law enforcement, national security, and other protected information. This sharing shall be coordinated through the CIO and Chief Data Officer Councils, as well as other interagency bodies, as appropriate, to improve interagency coordination and information sharing for common use cases.

(e) Within 120 days of the completion of their inventories, agencies shall make their inventories available to the public, to the extent practicable and in accordance with applicable law and policy, including those concerning the protection of privacy and of sensitive law enforcement, national security, and other protected information.

Sec. 6. Interagency Coordination. Agencies are expected to participate in interagency bodies for the purpose of advancing the implementation of the Principles and the use of AI consistent with this order. Within 45 days of this order, the CIO Council shall publish a

list of recommended interagency bodies and forums in which agencies may elect to participate, as appropriate and consistent with their respective authorities and missions.

Sec. 7. AI Implementation Expertise. (a) Within 90 days of the date of this order, the Presidential Innovation Fellows (PIF) program, administered by the General Services Administration (GSA) in collaboration with other agencies, shall identify priority areas of expertise and establish an AI track to attract experts from industry and academia to undertake a period of work at an agency. These PIF experts will work within agencies to further the design, development, acquisition, and use of AI in Government, consistent with this order.

(b) Within 45 days of the date of this order, the Office of Personnel Management (OPM), in coordination with GSA and relevant agencies, shall create an inventory of Federal Government rotational programs and determine how these programs can be used to expand the number of employees with AI expertise at the agencies.

(c) Within 180 days of the creation of the inventory of Government rotational programs described in section 7(b) of this order, OPM shall issue a report with recommendations for how the programs in the inventory can be best used to expand the number of employees with AI expertise at the agencies. This report shall be shared with the interagency coordination bodies identified pursuant to section 6 of this order, enabling agencies to better use these programs for the use of AI, consistent with this order.

Sec. 8. Responsible Agencies and Officials. (a) For purposes of this order, the term "agency" refers to all agencies described in section 3502, subsection (1), of title 44, United States Code, except for the agencies described in section 3502, subsection (5), of title 44.

(b) This order applies to agencies that have use cases for AI that fall within the scope defined in section 9 of this order, and excludes the Department of Defense and those agencies and agency components with functions that lie wholly within the Intelligence Community. The term "Intelligence Community" has the meaning given the term in section 3003 of title 50, United States Code.

(c) Within 30 days of the date of this order, each agency shall specify the responsible official(s) at that agency who will coordinate implementation of the Principles set forth in section 3 of this order with the Agency Data Governance Body and other relevant officials and will collaborate with the interagency coordination bodies identified pursuant to section 6 of this order.

Sec. 9. Scope of Application. (a) This order uses the definition of AI set forth in section 238(g) of the [John S. McCain] National Defense Authorization Act for Fiscal Year 2019 [Pub. L. 115-232, 10 U.S.C. 2358 note] as a reference point. As Federal Government use of AI matures and evolves, OMB guidance developed or revised pursuant to section 4 of

this order shall include such definitions as are necessary to ensure the application of the Principles in this order to appropriate use cases.

(b) Except for the exclusions set forth in section 9(d) of this order, or provided for by applicable law, the Principles and implementation guidance in this order shall apply to AI designed, developed, acquired, or used specifically to advance the execution of agencies' missions, enhance decision making, or provide the public with a specified benefit.

(c) This order applies to both existing and new uses of AI; both stand-alone AI and AI embedded within other systems or applications; AI developed both by the agency or by third parties on behalf of agencies for the fulfilment of specific agency missions, including relevant data inputs used to train AI and outputs used in support of decision making; and agencies' procurement of AI applications.

(d) This order does not apply to:

(i) AI used in defense or national security systems (as defined in 44 U.S.C. 3552(b)(6) or as determined by the agency), in whole or in part, although agencies shall adhere to other applicable guidelines and principles for defense and national security purposes, such as those adopted by the Department of Defense and the Office of the Director of National Intelligence;

(ii) AI embedded within common commercial products, such as word processors or map navigation systems, while noting that Government use of such products must nevertheless comply with applicable law and policy to assure the protection of safety, security, privacy, civil rights, civil liberties, and American values; and

(iii) AI research and development (R&D) activities, although the Principles and OMB implementation guidance should inform any R&D directed at potential future applications of AI in the Federal Government.

Sec. 10. General Provisions. (a) Nothing in this order shall be construed to impair or otherwise affect:

(i) the authority granted by law to an executive department or agency, or the head thereof; or

(ii) the functions of the Director relating to budgetary, administrative, or legislative proposals.

(b) This order shall be implemented consistent with applicable law and subject to the availability of appropriations.

(c) This order is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.

Calendar No. 283

117th CONGRESS

2d Session

S. 3035

[Report No. 117-82]

A BILL

To establish the Artificial Intelligence Hygiene Working Group, and for other purposes.

February 28, 2022

Reported with an amendment

Location: [Stanwood, WA 98292, USA](#)

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